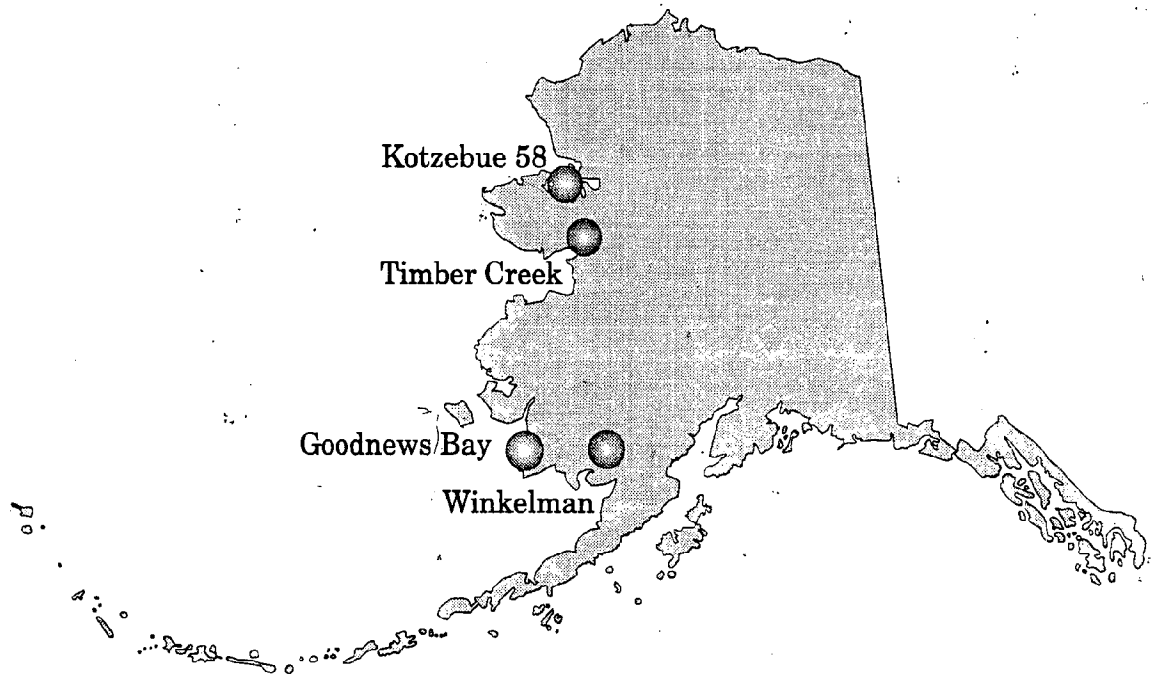


**HOW SUBSISTENCE CONCERNS ARE HANDLED IN
RURAL COASTAL DISTRICT IMPLEMENTATION:
FOUR CASE STUDIES**



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and Regional Affairs

FINAL REPORT

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HOW SUBSISTENCE CONCERNS ARE HANDLED IN RURAL COASTAL DISTRICT IMPLEMENTATION: FOUR CASE STUDIES

EXECUTIVE SUMMARY

Subsistence is a central focus of the coastal management programs of the rural coastal districts of western and northern Alaska. This reflects the economic and social importance of hunting, fishing and gathering to residents of these areas. The Alaska Coastal Management Program (ACMP) acknowledges the significance of subsistence by requiring districts and agencies to "recognize and assure opportunities for subsistence usage of coastal areas and resources" (6 AAC 80. 120).

Rural coastal districts have included subsistence as a major element in their plans:

"The NANA Coastal Management Program is tied closely to the subsistence lifestyle of the Inupiat people and the resources on which they depend...." (NANA Region CMP).

"Subsistence is the principal land use and predominant way of life among residents of the Bering Straits region" (Bering Straits CMP).

"...the most pervasive land use in the Yukon-Kuskokwim region ... is subsistence" (Cenaliurrit CMP).

Over the past decade, however, coastal districts have expressed dissatisfaction with the way subsistence concerns have been addressed by the ACMP. Several cases have been particularly controversial, and some coastal districts feel that rural community concerns are overlooked in consistency reviews.

The Alaska Department of Community and Regional Affairs (DCRA) commissioned this study in response to these concerns. The central question it addresses is:

Why does the State make permitting decisions that, in the opinion of the rural coastal districts, don't protect their subsistence activities?

The DCRA convened a Rural Coastal District Implementation (RCDI) Task Force, comprised of four coastal district coordinators and five state agency staff to guide this project. They selected a case study approach to allow detailed examination of permitting decisions involving subsistence in different coastal districts. They decided the study would examine four projects involving rural coastal district subsistence-related concerns.

Initial criterion for case selection were that the cases should involve completed consistency reviews, subsistence issues and potential cumulative impacts. Also at least one case should be chosen from the Northwest Arctic Borough (NWAB), the Bering Straits CRSA (BSCRSA) and the Cenaliurrit CRSA (CCRSA) coastal districts.

The four cases selected were the Kotzebue Sound 58 and Goodnews Bay offshore prospecting proposals, and the Timber Creek and Winkelman trapping cabin cases. The Goodnews Bay case is frequently referred to by people in the Cenaliurrit district as an example of poor treatment of local concerns by state agencies. It has strained the relationships between the Cenaliurrit district and the ACMP for several years. Similarly, the Timber Creek case has been of major significance to the Bering Straits CRSA and some of its villages.

This project included five major tasks:

- 1) Select cases and identify research issues;
- 2) Research case studies;
- 3) Analyze case study data, to identify problems and potential solutions;
- 4) Draft report and discuss potential solutions with Task Force;
- 5) Prepare final report, including recommended solutions.

Research methods included reviews of case files and interviews with agency and coastal district participants in the consistency review process. They also included reviewing findings with the RCDI Task Force. The intent was not only to identify the problems with addressing subsistence concerns through the ACMP, but also to identify what is working well, and whether there were lessons rural coastal districts could learn from one another.

The results of the detailed case studies are described in Chapter Three of this report. Each case study begins with a case description that traces the history of the proposed project through the consistency review and any subsequent elevations or appeals. This is followed by an analysis of what worked and what did not work well during the consistency review. Each analysis summarizes the major problems in the treatment of subsistence concerns. Two of the cases involved projects where the rural coastal district was dissatisfied with the way subsistence concerns were treated in the consistency review, while two of them involved projects where the district was reasonably satisfied.

Chapter Four compares and analyzes the results of the four case studies to identify common causes for the gap between district expectations and agency decisions that affect subsistence. It discusses problems identified as generally significant through the case studies. It also discusses several major topics that crosscut and link these problems, including local knowledge, cumulative impacts, and different views about subsistence and the ACMP.

This project identifies five different programmatic levels as important in implementation of the ACMP in relation to subsistence protections. This provides a framework for analyzing and comparing the four cases, as well as identifying problems and potential solutions.

The first level is the broad social and political context within which the ACMP operates. This includes the "big picture" of differing ideas, attitudes, values and interests that are important for making sense out of the ways that people view subsistence. The second level is the policy framework of statutes and regulations that govern the ACMP and other state plans and authorities. This includes AS 46.40; 6AAC 50; 6AAC 80 and 6AAC 85, among others. The ACMP subsistence standard (6AAC 80.120) and other policies that structure the district plans and the consistency review process are key elements at this level. The third level are the specific coastal management plans and programs. These include the elements common to each of these plans, including their Goals, Resource Inventory and Analysis, any Special Areas, and identified Subsistence Policies.

The fourth level are specific consistency reviews. This is the implementation phase of the ACMP. Consistency reviews are structured both by ACMP regulations, the coastal district

specific
decision-making
step

end level!

plans, and by state and coastal district enforceable policies. The consistency review process results in specific decisions, which are viewed by rural coastal districts as either satisfactory or unsatisfactory. The fifth level is monitoring and enforcement of permit conditions and stipulations. This area is beyond the scope of this project. Decisions and actions at each of these programmatic levels affected the outcomes of the four cases, and people's perceptions of those outcomes. Different types of solutions are possible at each level as well, they provide a useful way to organize analysis and interpretation of the cases.

Chapter Four concludes that the four case studies indicate that there are significant barriers to effective incorporation of rural coastal district concerns about subsistence. These range from divergent views about the importance of subsistence to failure to systematically apply the ACMP subsistence standard in district plans or to effectively use local knowledge in consistency reviews. Widely differing views on the broad importance of subsistence and on who should decide the balance seems to underlie much of the dissatisfaction with the ACMP by rural coastal districts. This is exacerbated by communication differences. On the policy, district plan and consistency review levels a series of problems with implementation of the program have been identified. These include the failure to incorporate specific subsistence information, subsistence zones, and subsistence policies in district plans, as well as difficulties in getting full attention to subsistence impacts during consistency reviews. Failure to make effective use of local knowledge and of district plans and policies during consistency reviews also contributes to these problems.

who should
decide?

Chapter Five discusses potential solutions to these problems. These range from program adjustments such as providing increased training to district and agency staff, to more complex changes to state policy, such as strengthening rural coastal districts' role in consistency reviews. Revising ACMP regulations to give coastal districts a stronger form of due deference is a solution preferred by some rural coastal districts.

balancing
competing
interests

poor
understanding

The ACMP is based on the concept of identifying important land uses, and then striking a balance between competing interests. However some rural coastal districts feel that given the central importance of subsistence in some instances the usual approach of balancing competing interests should not apply. They see the state and its agency representatives, who are charged with helping to strike a balance during consistency reviews, as having such different life experiences and so little understanding and sympathy for subsistence that they cannot fairly balance subsistence values against others. Therefore, these rural coastal districts conclude, the coastal districts should be in the position to evaluate when and to what extent a balance is appropriate. They argue that this is the point of due deference.

successful
strategies

The ACMP has experienced some successes in ensuring that subsistence concerns are adequately addressed in consistency determinations. It seems to be most successful in cases where districts identify subsistence zones, develop clear policies for protecting subsistence in their plans, reference these policies during consistency reviews, convey specific local knowledge about uses and resources of concern, and have backup from science and/or the best professional judgment of agency staff. Another successful strategy involves developing long-term professional relationships with agency staff, so that the coastal district can build on successful resolutions of issues over time.

short &
long-term
solutions

Chapter Six provides four sets of recommendations ranging from high priority solutions that can be implemented immediately with only minor program changes, to longer-term solutions that would require significant policy changes. Among the high priority solutions are steps to better incorporate local knowledge and to improve the use of existing tools as critical steps for ensuring full consideration of subsistence concerns.

1.0 INTRODUCTION

For Alaska Natives ... subsistence is a way of life....

The traditional economy is based on subsistence activities that require special skills and a complex understanding of the local environment that enables the people to live directly from the land. It also involves cultural values and attitudes: mutual respect, sharing, resourcefulness, and an understanding that is both conscious and mystical of the intricate interrelationships that link humans, animals, and the environment.

To this array of activities and deeply embedded values, we attach the word 'subsistence,' recognizing that no one word can adequately encompass all these related concepts.
(Thomas Berger, 1985)

Subsistence is a central focus of the coastal management programs of the rural coastal districts of western and northern Alaska. This reflects its importance in the way of life in these areas. Hunting, fishing and gathering of local resources for food and other domestic uses are among the most important of all land use activities to their residents. These activities are not only a key feature of their economy, but are central to their culture and to individual and group identity.

The Alaska Coastal Management Program (ACMP) acknowledges the importance of subsistence to rural coastal districts. It provides a specific subsistence standard that requires districts and agencies to "recognize and assure opportunities for subsistence usage of coastal areas and resources," and that provides for identification of subsistence zones, in which subsistence is the dominant use and has a priority over nonsubsistence uses and activities (6 AAC 80. 120 & 158).

Since the mid 1980's rural coastal districts have included subsistence activities as major elements of their plans:

The NANA Coastal Management Program is tied closely to the subsistence lifestyle of the Inupiat people and the resources on which they depend....Subsistence hunting, fishing and foraging is a matter of survival to the people of the area. This strong relationship between the people of the region, and their environment, and the renewable land and sea resources provides the framework of this plan (NANA Region CMP, Vol. 1 p1-6 & 7).

Subsistence is the principal land use and predominant way of life among residents of the Bering Straits region (Bering Straits CMP).

the most pervasive land use in the Yukon-Kuskokwim region and the largest in terms of individuals involved and hours of effort is subsistence. Hunting and gathering occurs universally throughout the region (Cenaliulriit CMP, 4-41).

In recent years, however, coastal districts in these areas have expressed dissatisfaction with the way that subsistence concerns are being addressed by the ACMP. They have been

particularly frustrated by the way that state agencies have implemented district policies involving subsistence in several high profile cases.

This report describes the results of a study commissioned by the Alaska Department of Community and Regional Affairs (DCRA) to examine these concerns. This project is part of a broader reexamination of the ACMP underway as part of the Section 309 ACMP Assessment. DCRA initiated this project at the request of rural districts to determine why this gap between local expectations with regard to subsistence and program implementation has occurred and to identify possible program changes to address these concerns.

Project Description

The Department of Community and Regional Affairs (DCRA) issued a Request for Proposals (RFP) for this project in October, 1995. The purpose of the project was to examine why State implementation of rural coastal district subsistence policies has not met the expectations of the districts. The central question asked by the RFP was:

Why does the State make permitting decisions that, in the opinion of the rural coastal districts, don't protect their subsistence activities?

The project was intended to identify the reasons for this gap between district expectations and program implementation, and to recommend solutions to address the concerns. Issues of concern in this project include, but are not limited to:

- 1) Whether cumulative impact (CI) assessment is part of consistency determinations for rural districts.
- 2) How local knowledge can be part of a CI assessment for state consistency determinations.
- 3) Whether district policies are written so implementation meets district expectations.
- 4) Whether Native participation in the state consistency determination and appeals processes is undermined due to differences in Native and non-Native communication.
- 5) Ways to look at CIs, rather than incremental affects of a project or projects, and incorporate this information into the consistency determination process.
- 6) How state agency missions and authorities affect decisions viewed as unfavorable to subsistence.
- 7) Whether the impacts of a project are understood, and the state simply has an opinion different than the districts.
- 8) How the state uses scientific studies, best professional judgment, and local knowledge to justify a decision. (How do these types of information hold on appeal or in court? How does this influence how information is treated in the decision making process and result in decisions that don't protect subsistence?)
- 9) The definition of subsistence and what really is being talked about. (Is it about having access to fish and wildlife resources, or does it include having a certain quality of experience? What are these qualities and how can they be preserved short of ensuring no change?)
- 10) Ways a district plan can better capture and communicate local knowledge about coastal resources, particularly in regard to subsistence resources.
- 11) Appropriate procedures and means for districts to communicate local knowledge through participation in consistency reviews.
- 12) The adequacy of the local knowledge definition currently being discussed by the Coastal Policy Council.

level of
scientific
understanding

who?

The DCRA convened a Rural Coastal District Implementation (RCDI) Task Force, comprised of four coastal district coordinators, and five state agency staff, to guide the project. The RFP directed that the project would be developed in close consultation with this group. Members of the Task Force are:

Janet Burleson Baxter, DNR	Chuck Degnan, Bering Straits CRSA
Sue Flensburg, Bristol Bay CRSA	Arleen Murphy, DGC
George Owletuck, Cenaliulriit CRSA	Fran Roche, DEC
✓ Glenn Seaman, ADFG	✓ Frank Stein, Northwest Arctic Borough
✓ Nelda Warkentin, DCRA, Project Manager	

A case study approach was selected for this project to allow detailed examination of permitting decisions involving subsistence in different districts. The intent was not only to identify the problems with addressing subsistence concerns through the ACMP, but also to identify what is working well, and whether there were lessons rural coastal districts could learn from one another.

Limitations

The topic of subsistence is difficult to isolate or separate from broader social issues. It lies between the biophysical and the social worlds, between cultures, and between economic, cultural, and political concerns. One of this project's challenges is to focus narrowly enough that its product will be useful, while maintaining this context of connectedness. This requires starting out narrowly, looking at the four specific consistency reviews, then reaching out broadly to understand the context and connections, and then finally narrowing in again on a core of issues that can be usefully addressed in a limited project of this kind.

Therefore, while this project touches on such major issues as the relationships between the ACMP and other State agency responsibilities, including due deference, it is not intended to comprehensively address or analyze them. Instead, the purpose of this project is to focus in on concerns about subsistence, and how they are dealt with in implementing the ACMP.

It is also important to understand the limitations of the case study approach. This study examines four cases of ACMP implementation, in four different rural coastal districts, dealing with different types of issues and different agencies. It is extremely difficult to generalize to the ACMP program as a whole from such a limited sample. We have attempted to compensate for this by having the RCDI Task Force review the cases and discuss what is unique about them, and what is common to other issues that they deal with. We have also attempted to draw on broader research and agency experience in addressing subsistence concerns in rural Alaska. The fact remains, however, that the conclusions of this study are based on a relatively limited set of cases and situations.

Report Organization

Chapter 2 describes the methods used in the study. Chapter 3 discusses the four cases that are the heart of the project. Each case study begins with an overview of the proposed project, then follows the history of the project consistency review, examining how each party responded, and concludes with an analysis of the key issues that influenced the outcome of the case. Chapter 4 draws from the cases, and comparisons between them, to identify significant problems with the way that subsistence concerns are dealt with in rural coastal district consistency reviews. Chapter 5 identifies potential solutions to these problems.

2.0 METHODS

This project examines four projects that involved subsistence-related concerns by rural coastal districts. This allows analysis of the dynamics of a few cases in considerable detail, rather than a more superficial overview of a large number of cases.

Research methods for this project included both obtaining and reviewing the case file and conducting interviews with agency and coastal district participants in the consistency review process. They also included reviews of findings and discussions with the RCDI Task Force.

Project Tasks

This project included five major tasks, which are described below:

- 1) Select cases and identify research issues;
- 2) Research case studies;
- 3) Analyze case study data, to identify problems and potential solutions;
- 4) Draft report and discuss potential solutions with Task Force;
- 5) Prepare final report, including recommended solutions.

Case Selection

The RCDI Task Force directed that four cases of consistency reviews in rural coastal districts be studied. Initial criterion for case selection were that the cases should involve completed consistency reviews, subsistence issues and potential cumulative impacts. Also at least one case should be chosen from the Northwest Arctic Borough (NWAB), the Bering Straits CRSA (BSCRSA) and the Cenaliulriit CRSA (CCRSA) coastal districts.

Rural coastal districts comment on varying numbers of permit reviews. Between 1992 and 1995, for example, the Bering Straits CRSA commented on 191, the Bristol Bay CRSA on 118, Cenaliulriit on 64, and Northwest Arctic Borough on 33. However no master list of consistency reviews with data related to the criterion of interest in this project exists. The research team therefore reviewed documents and interviewed coastal coordinators from each of these districts and the Bristol Bay CRSA (BBCRSA) as well as DGC consistency review coordinators and other state agency permitters to assist in identifying potential cases. As part of this process a questionnaire was used to elicit information about cases and issues of potential concern to the study.

Coastal district and agency staff helped identify 12 potential cases where subsistence was a significant issue. Most of these occurred in recent years, although a few went back a decade. These potential cases are summarized in Appendix A.

Based on the interviews the team identified additional criteria to consider in case selection. Factors used in selecting the cases are reviewed below.

Situations where coastal district recommendations were overruled.

Since the focus of the study is on why the state makes permitting decisions that districts disagree with, a goal was to identify cases where the district recommendation was not followed.

Representativeness of cases.

Some of the high profile cases with which rural districts are concerned are probably not representative of the way that districts' recommendations are treated in a statistical sense. This is suggested by the small number of cases where subsistence is identified as a significant issue.

However, one of the things identified repeatedly is that many subsistence concerns are not brought out in specific cases, and don't make their way into the coastal district responses and the ACMP process -- this is part of the frustration that coastal districts experience -- that an issue so central to rural peoples' lives is so difficult to bring to the attention of permitting agencies.

Examples of successful projects.

One project objective is to identify when and why ACMP implementation works well. It is helpful to consider cases which were successful from the coastal district perspective. This allows a look at what went right and why.

The Kotzebue 58 case is an example of a major project in which a district position was upheld in the agency consistency determination. The Bristol Bay trapping cabin cases are also of interest in this respect because the issues are similar to northwest Alaska's, but a different regulatory approach is taken. This allows comparison and contrast in identifying potential solutions.

Different types of subsistence issues.

Another issue involves a question of whether different types of subsistence concerns are treated differently. Several interviews pointed to differences between cases where there is a direct impact to the fish and wildlife resource used for subsistence, compared to situations where the concern is with increased competition and conflict between different users. Both are of concern to coastal districts. One suggestion is that agencies are more responsive to coastal district concerns when the impact is a direct one to fish or wildlife or their habitat. The second type seems more controversial, and there appears to be little agreement or guidance on how to handle these indirect impacts on subsistence. Both types seemed important to consider in the study.

*Resource
Limitations*

*User
Conflicts!*

Local knowledge, scientific data, and best professional judgment.

Coastal district staff frequently reported that knowledge about subsistence is undervalued and not incorporated into agency permitting decisions. This exacerbates coastal district's sense that subsistence concerns are not adequately addressed. Initial interviews suggested that when districts, or others, have scientific data or best professional judgment that supports district concerns, their recommendations are more likely to be followed.

The ACMP 309 Assessment recommends that more formal recognition of local knowledge could improve planning and permitting in rural Alaska. Other studies suggest that local knowledge could contribute to assessing cumulative impacts and improving the effectiveness of planning, natural resource management, and social services delivery in rural Alaska (Ashton, 1996; Gallagher, 1988; Kelso, 1982; Wolfe, 1993). Long-term familiarity with, and knowledge of particular places, local environmental conditions, and socio-economic contexts is increasingly seen as a valuable resource for decision-making that can complement the role of science in decision-making. One of the challenges for this project was to identify how the local knowledge and life experiences of people in rural coastal communities could be more effectively incorporated into ACMP planning and implementation, given the barriers of different languages, social systems, and political concerns about subsistence.

Changes over time in policy and procedures.

Changes over time in how state agencies act with regard to rural coastal districts' subsistence concerns was another factor noted in some interviews. What differences have different state administrations' policies made? Cases that represented different time periods and different administrations were needed to assess this.

After a preliminary review of the cases against the criterion noted above four were recommended for detailed study in the project. These included the Kotzebue Sound 58, Goodnews Bay, and the Timber Creek and Winkelman trapping cabin cases. Two of these cases are viewed as particularly serious or significant by the affected coastal districts. The Goodnews Bay case is frequently referred to by people in the Cenaliurrit district as an example of poor treatment of local concerns by state agencies and has soured its relationship to the ACMP for several years. Similarly, the Timber Creek case has been important to the Bering Straits CRSA and some of its villages.

The study team discussed case selection criteria, the 12 potential cases, and the four recommended cases with the RCDI Task Force in a September 12, 1996 teleconference. Preliminary research issues and questions were also discussed at this meeting. The Task Force accepted the case recommendations.

Researching Case Studies

The team compiled background information and began research on the four selected cases. Among other issues it examined:

- 1) How did the agency and district make decisions during the review?
- 2) What format and methodology were used?
- 3) How were conclusions reached?
- 4) What CRSA or agency concerns were not addressed and why?
- 5) What about the process worked? What didn't work?
- 6) What could have been done better?
- 7) How can a district plan better capture and communicate local knowledge about coastal resources -- particularly in regard to subsistence resources?
- 8) How can districts communicate local knowledge through participation in consistency reviews?
- 9) Is the definition of local knowledge being considered by the CPC workable?

Answering these questions requires determining the timing and sequence of decisions and actions, identifying who was involved, and then identifying the objectives and interests of both the coastal district and responding agencies. The case file for each consistency review was located and reviewed. A chronology of major actions and decisions for each case was developed as a framework for organizing materials. Key documents were read and important issues were summarized. District and agency staff involved in the cases were identified and additional telephone and in-person interviews were conducted.

An important part of this research was detailed interviews. A series of phone interviews was conducted with coastal district coordinators from each of the four areas. A trip was made to allow follow-up in person interviews with the coastal district coordinators in NWAB (Kotzebue) and BSCRSA (Unalakleet). Agency staff in Anchorage and Juneau were also interviewed in person. Telephone interviews were held with agency staff in Fairbanks and with district staff and others in the Cenaliurrit and Bristol Bay regions. This research formed the basis for analyzing how decisions were made and what problems occurred during consistency reviews.

Analyzing Cases.

Analysis of the four cases involved three interrelated steps. The first was to examine the specific history and internal dynamics of decision-making of each case. This was accomplished by organizing case notes, creating the chronology of events noted above, and then examining the history of the consistency review. This included reviewing the various questions and factors identified above as potentially significant, and summarizing those that seemed most important to the outcome of each case. The results for each consistency review are reported in the case analysis sections of Chapter 3.

The second step was to make comparisons across the cases, to identify commonalities and differences in the issues, and in the ways they were addressed and handled in the consistency review process. This allowed identification of problems that are common to more than one case, and that seem to answer the basic research question. In cross case comparison particular attention was given to the ways that different groups talk and write about the fish and wildlife and other resources used for subsistence; the human uses and users of these resources; and the decision-making processes that affect both these resources and human uses. The results of this task are described in Chapter 4.

A framework was developed to use in analyzing the individual cases, and to make comparisons between them and identify problems. This framework, which describes the different levels of the ACMP, is discussed in Chapter 4, and is illustrated in Figure 5.

While data collection and analysis are described here as distinct tasks, in practice they were closely connected. Preliminary analysis of the cases occurred as the data was collected, which in turn led to additional questions and issues, guiding further data collection.

Report Preparation and Review.

The final phase of the analysis is to use these comparisons as the basis for identifying potential solutions. This is accomplished partly by examining what worked well and what did not work in the various cases.

This phase involved identifying the issues and problems posed for local districts in attempting to implement the ACMP, and identifying potential solutions. This was accomplished by analyzing the results of the case study research, together with other interviews and discussions, and developing a set of potential solutions in a draft report. Finally the research team worked closely with the Task Force to evaluate these ideas and decide which of them might be most successfully implemented.

The contract anticipated that the project would recommend program changes to the ACMP. Areas of possible changes noted by the scope of work included:

- Amendments to 6 AAC 50.
- Changes to the consistency determination/appeals process.
- District program policy or implementation chapter changes.
- Changes to district planning guidance or regulations.

The draft report was distributed to the RCDI task force on November 27 and reviewed at a December 12 Task Force meeting. A draft recommendations section was also prepared based on Task Force comments, and reviewed at a January 14 meeting of the Task Force. Results of the project were also reviewed and discussed at the ACMP Regional District Conference on January 22. The final draft incorporates information, and reflects comments, from all of these meetings, as well as from individual Task Force member's written and oral comments throughout the project.

3.0 THE CASE STUDIES: FOUR COASTAL PROJECTS

A. TIMBER CREEK: TRAPPING CABIN

CASE DESCRIPTION

Proposed Project

In July 1990, Mr. Keith Koontz applied for a State of Alaska Department of Natural Resources (DNR) Trapping Cabin Construction Permit. In August, at the request of DNR, he submitted a Coastal Project Questionnaire. He proposed to construct a cabin in the Timber Creek drainage of Nutmoyuk Creek, a tributary of the Koyuk River, to trap for personal subsistence use (Figure 1). The proposed cabin site was on state land and subject to the DNR Northwest Area Plan (NWAP). It was also within the Coastal Management Plan's designated Permit Notification Area (PNA). The project consistency review was coordinated by the northern region DNR Division of Land and Water (DLW) because the DNR trapping cabin permit was the only permit required.

Map 3-1 of the BSCRSA CMP depicts the boundaries of the coastal zone as well as the PNAs outside of the coastal zone boundaries. Projects within PNAs "could be affected by development activities, but there is less certainty that activities occurring in these areas could result in direct and significant impacts to coastal resources." (BSCRSA CMP Vol. 3, p. 3-7). Both the BSCRSA and the DNR agreed from the outset that the project was within the PNA depicted on Map 3-1.

Coastal District and Local Community Comments

In a March 1991 letter the BSCRSA coastal district notified DNR that it opposed issuing the trapping cabin permit because the cabin "could seriously disrupt the general subsistence use patterns of local residents." The coastal district found the project inconsistent with four BSCRSA CMP policies (including the plan's subsistence policy) and with management guidelines from the NWAP that addressed management of trapping and remote cabins.

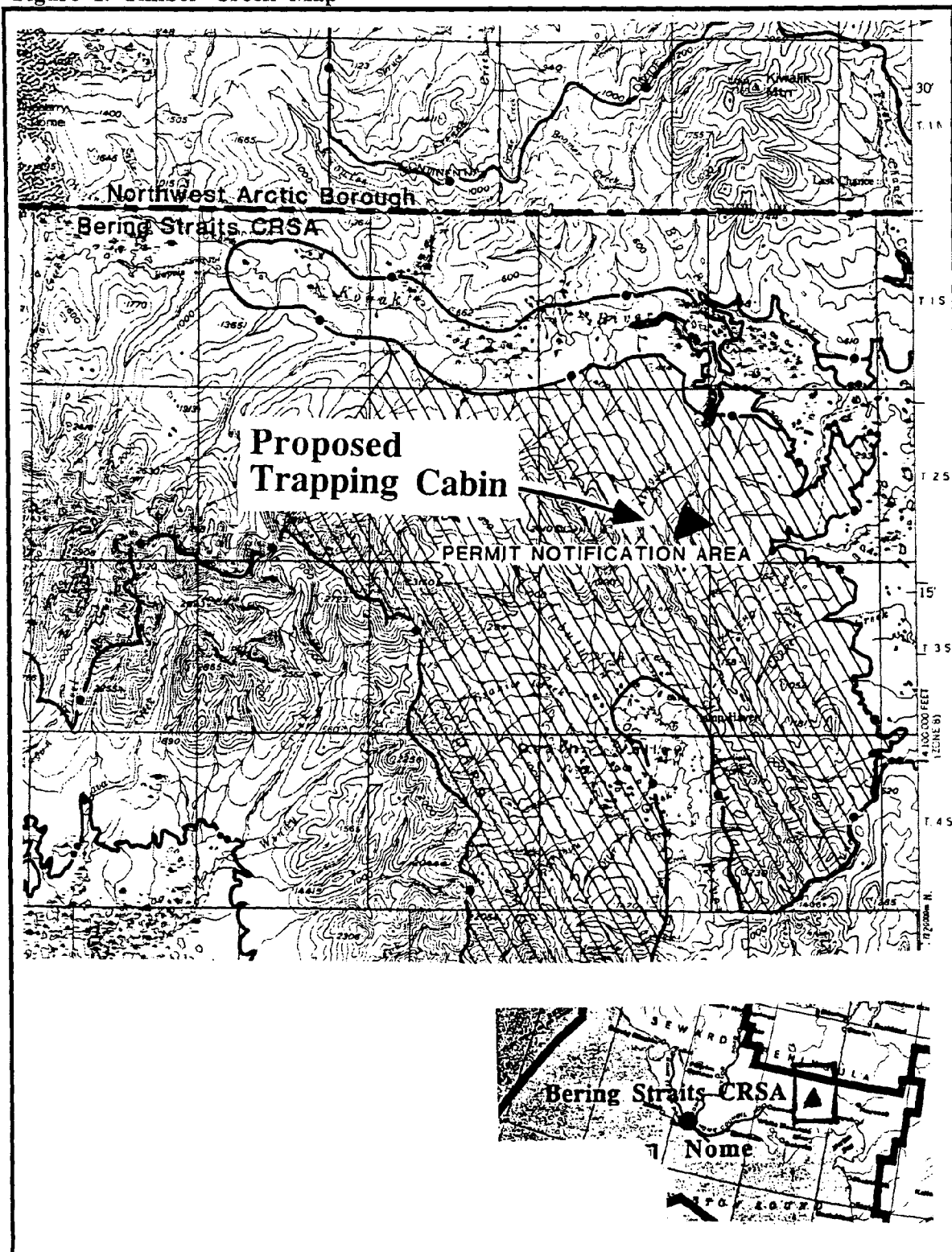
The coastal district comment letter did not provide rationale for its finding that the project was inconsistent with four BSCRSA policies beyond referring to the NWAP Guidelines, which do present strong and clear statements. The district also noted that its comments reflected "concerns of the affected communities."

The four BSCRSA policies and NWAP Guideline referred to by the district included:

A-1 Subsistence Use

Subsistence use of the coastal lands and waters of the Bering Straits CRSA has traditionally been the primary and highest priority use of all lands and waters within the coastal management plan area; therefore, all other land/water uses and activities shall ensure that through careful planning, development, and operation of a resource extraction or development project, all steps will be taken to mitigate

Figure 1. Timber Creek Map



adverse impacts to subsistence resources and their use in accordance with Policy F-2.

A-4 Impacts on Subsistence

Within Important Use Areas identified for subsistence resources and activities in Chapter 4, entities proposing non-subsistence uses or activities shall locate such uses and activities at alternative sites outside the identified areas. Where location in alternative sites is not feasible and prudent, uses and activities shall minimize adverse impacts to subsistence resources, subsistence activities, and coastal habitats.

B-2 Habitat Alteration

All habitats shall be managed to maintain or enhance the biological, chemical, and physical characteristics of the habitat which contributes to its capacity to support living resources.

K Disposals of Interest

The Bering Straits CRSA will participate in the planning process for programmatic state land disposals in accordance with authorities outlined in AS 38 (for example, AS 38.04.065, AS 38.05.300, AS 38.05.945), 6 AAC 50, and other Department of Natural Resources procedures (Land Administration Data System, or "LADS" process).

The following Management Guidelines for cabins from the DNR NWAP were also identified by the Bering Straits coastal district as applicable to the proposed trapping cabin:

Management Guidelines for Trapping Cabins

A. Permits and Community Practices

...The construction of permanent shelters for the purpose of trapping or hunting is not common in Northwest Alaska. Tents continue to be the primary shelters utilized during trips away from the central residence or fish camp. The ability to move freely without regard to individual territorial restrictions is an important element in the local system of land use. Sociologically, the catch from trapping areas was generally shared by a large family or within the local family kinship system. Biologically, the furbearer carrying capacity of Northwest Alaska is much lower than that in other, more forested areas of the state. Trapping use has traditionally moved with the resource...Issuance of a trapping cabin permit to an individual would be contrary to the existing open and non-territorial system of trapping practiced in Northwest Alaska, and could seriously disrupt the general subsistence use patterns of the local residents. For these reasons, trapping cabin construction permits should not be issued if the cabin will conflict with existing trapping and subsistence activities. (NWAP, page 2-26).

Management Guidelines for Remote Cabins

I. Use of Cabins for Trapping

Under the current remote cabin regulations, commercial trapping and other commercial uses are not allowed from a remote cabin...(NWAP, page 2-26)

In addition to the BSCRSA coastal district letter citing the above policies, the DLW received comment letters from the Elim Native Corporation, a Golovin resident, Bering Straits Native Corporation, and a petition from the City of Koyuk. These were all submitted within the time frame established by the DLW for comment letters.

The Elim Native Corporation letter objected to the cabin proposal due to its potential to reduce "the income of our local trappers," and because of the potential for an "influx" of cabin building in this area. It noted that the proposed cabin was in an area used for trapping by the villages of Koyuk and Elim. Elim further explained that local trappers have not used this area in recent times because they feel that it does not contain an adequate number of furbearing animals, and should be left alone for the populations to recover.

local resource management

The letter from a Golovin resident opposed the construction of the cabin because it was proposed for an area that could be subject to Native or State selection, and because there was not enough information contained in the permit to address issues of forest fire prevention, liability, or compensation for loss of trees.

liability
- resource impact
- subsistence impact

The letter from the Bering Straits Native Corporation expressed concerns about damage to the forest area and tundra due to removal and transport of timber, the potential for the cabin to be used for big game guiding activities, damage to the tundra due to airplane landings and take-offs, and interference with traditional subsistence hunting activities.

The Bering Straits Program Director submitted the Koyuk petition to the DGC. It contained 47 signatures from Koyuk residents opposing the proposed cabin. The petition stated that, "we feel that a cabin in the area would interfere with our subsistence lifestyle, as the area is a primary source of moose, caribou meat; also for a source of income for individuals who trap there."

- subsistence lifestyle impact

Letters from the City of White Mountain and Koyuk Native Corporation were also forwarded to DGC by the Bering Straits Program Director after the established deadline for comments. The City of White Mountain letter opposed the proposed cabin based on its potential adverse impacts of subsistence hunting and trapping. The Koyuk Native Corporation letter to the coastal district objected to the proposed cabin because of its potential to be used for big game guiding activities.

Agency Comments

DGC and ADF&G submitted comment letters on the Timber Creek trapping cabin proposal to DNR. Both letters were received within the time frame established for consistency review comments. DGC stated that it had "no objection to issuance of the subject Trapping Cabin Permit, provided that the other State agencies have no objections to the project and the activity is determined to be consistent with the Alaska Coastal Management Program." The letter from ADF&G was sent to DLW and stated that they "have no objection to issuance of the construction permit and find the proposed activity consistent with the ACMP."

After the official comment period, the DLW provided ADF&G biologist Bob Nelson with a summary of the opposition letters from the coastal district and local villages and asked him to comment on the issues and concerns expressed within the letters. ADF&G responded with a letter explaining that:

The Death Valley area and Upper Koyuk River Drainage generally does not support high densities of furbearers. Numbers tend to fluctuate in direct relation to prey abundance. Data gathered from sealing certificates and fur acquisition reports indicate relatively few residents from the surrounding villages of Koyuk, Elim, and White Mountain trap and (to the knowledge of the ADF&G biologist), none of them have harvested fur from the area within the past ten years. Mr. Koontz has been operating in this area for a number of years and to my knowledge, his presence has not impacted wildlife or interfered with activities of residents from surrounding

villages. I therefore do not see any problem with his constructing a cabin in the area indicated.

Consistency Determination, Elevation and Appeals

On March 20, 1992, DNR issued a Proposed Consistency Decision finding the trapping cabin consistent with the Alaska Coastal Management Program (ACMP) as long as four stipulations were adhered to that addressed the concerns of the district. The four stipulations required that Mr. Koontz:

- 1) only use the cabin for activities related to trapping;
- how? 2) use best efforts to avoid disturbing caribou and other big game animals while trapping;
- 3) comply with accepted forest practices while cutting logs for the cabin;
- 4) maintain the cabin in a "fire safe" manner and assume full liability for any damages to state land from fires.

No connection was drawn between the stipulations and any ACMP or BSCSRA CMP policies. However, the decision noted that the stipulation requiring that disturbance be avoided to big game during trapping was "intended to prevent conflict between the applicants trapping activities and subsistence hunting."

On March 25, 1992 the Bering Straits CRSAs coastal district notified DNR that they disagreed with the proposed consistency determination and requested elevation of the decision. DNR requested the district provide an alternative consistency determination that would meet its concerns. The district responded that the applicant might build a cabin in one of the nearby communities or contact one of the many private landowners for a land use permit.

next level
directors
In May 1992, a director level elevation meeting was held. The DNR staff paper outlining the issues to be resolved during this directors' elevation cited the following issues in this case:

The comments from the members of the BSCSRA district reflected a suspicion of the applicant's intent to use the trapping cabin for big game hunting (Mr. Koontz is a registered guide). It was further remarked that the local people were not trapping in this area because they were waiting for the furbearer population to rebound. Residents of Elim, Koyuk, and White Mountain claim the area of the proposed trapping cabin to be their traditional and common trapping ground. They contest that a permanent structure and annual trapping would interfere with their traditional and common use.

The directors' Proposed Consistency Determination partially reversed DNR's finding and concluded that while trapping was consistent with ACMP, a permanent structure was not. The directors explained that :

The permit application (is) consistent with the ACMP; however, the state determined that a permanent shelter was not compatible with the terrain and local use of the area. The state proposes as an alternative to constructing a cabin, (the applicant) construct a temporary wall tent under the authorization of a land use

permit. Tents are consistent with the historic use in the region and are less likely to discourage others from using the area. (Parentheses added).

The directors attached 21 conditions to the DNR Land Use permit that primarily relate to maintenance and the liability of operating on state land. Their decision did not refer to any ACMP or BSCRSA policies.

On May 31, 1992 Mr. Koontz requested elevation of the director-level ACMP consistency determination to the commissioners. *commissioner level decision*

how selected from where?
In June 1992, a commissioner level elevation meeting was held and a Conclusive Cabinet-Level Consistency Finding was issued reversing the directors' decision. The commissioners found the proposed trapping cabin consistent with the ACMP. In contrast to the directors, the commissioners appear to have based their decision on a strict review of the four enforceable coastal plan policies cited by the BSCRSA and not on the consistency of the proposed cabin with the management guidelines contained in the NWAP. Their analysis concluded that: *legitimate application*

BSCRSA Policy A-4 concerns subsistence use in Important Use Areas. The BSCRSA coastal coordinator verified that the proposed cabin location was not in an Important Use Area, so this policy was determined to be not relevant.

Policy B-1 requires conformance with the State Habitats Standard, 6 AAC 80.130. Concerns about Policy B-1 and impacts to habitat were laid to rest as a result of an ADF&G letter that indicating that a similar cabin and operation owned by the applicant in a nearby area had not impacted wildlife nor interfered with activities of residents from surrounding villages.

Enforceable Policy K concerns disposals of interest and basically requires district participation in the planning process. The BSCRSA participated in the review of this project, so the intent of this policy section was met.

BSCRSA Policy A-1 requires that subsistence use be given high priority, and that steps be taken to mitigate potential adverse impacts on subsistence resources. This was applicable to the proposed trapping cabin since trapping is a legitimate subsistence use and the area is remote and potentially dangerous in certain weather conditions. A wall tent did not provide an adequate structure to carry out the applicant's existing operations in a safe and reliable manner, and it had not been substantiated that the proposed construction would negatively impact subsistence or traditional and customary use of the area.

On July 6, 1992, the Bering Straits coastal district and Native Village of Koyuk IRA Council filed separate petitions with the Alaska Coastal Policy Council (CPC) requesting review of the commissioners' decision. On October 5, 1993, a Hearing Officer was appointed and the two petitions were consolidated for a CPC petition hearing. *who? how appointed?*

The hearing was held in May 1993, and a decision issued in October 6, 1993 concluding that the proposed trapping cabin was consistent with the ACMP and the NWAP. The CPC's Hearing Officer based the decision on findings that the trapping cabin would not impact subsistence resources and their use, would not adversely impact area habitat, was *not* within an IRUA (and was therefore *not* subject to special scrutiny for impacts to subsistence uses and activities), and that the BSCRSA had participated in the permit process for the proposed trapping cabin consistent with BSCRSA CMP policy requirements.

The Hearing Officer responded to cumulative impact concerns by analyzing the potential for the trapping cabin to be a "magnet" for other hunters and trappers. The Hearing Officer compared the proposed Timber Creek cabin with the public-owned Shaktoolik cabin, which is heavily used and has served to attract a large number of hunters from outside of the region. The Hearing Officer decided that construction of the Timber Creek cabin would not have the same detrimental impacts as that of the Shaktoolik cabin because the Timber Creek cabin was not for public use, was more isolated and not in an area with a large moose population.

The Hearing Officer further concluded that the CPC had no jurisdictional authority to consider DNR compliance with the NWAP. However, the Hearing Officer addressed the matter anyway and concluded that DNR was in compliance with the NWAP.

The CPC decision was appealed to Alaska Superior Court by the Bering Straits CRSA coastal district and Native Village of Koyuk IRA Council.

*6-2-96
CPC
Hearing Officer
advised
advised*
In May 1996, the Superior Court issued a Memorandum Decision and Order affirming that the findings of fact by the CPC Hearing Officer were supported by substantial evidence and provided a reasonable basis for the conclusions adopted by the CPC. "Adverse effects on subsistence activities have not been shown. The stipulations required by DNR fully mitigate any adverse effects that may be present." The Court ruled that there was a reasonable basis for the CPC's decision that the trapping cabin was consistent with both the BSCRSA and the NWAP.

However, the Superior Court reversed the decision of the CPC on the issue of CPC authority to review the cabin's consistency with the State NWAP. The Superior Court stated that the CPC *does* have jurisdiction to consider and decide upon the consistency of the proposed cabin with the NWAP.

The Court ruled that this was so because AS 46.40.100(d)(2) provides the CPC with authority to determine 1) whether a state agency's actions are consistent with the district coastal management program and 2) whether the state agency's actions are "consistent with requirements imposed by state statute, regulation, or local ordinance applicable to the use or activity."

The CPC found the NWAP to be neither state statute or regulation but DNR's own "official policy" which the CPC could not enforce. The CPC rejected the petitioners arguments that the BSCRSA by implication incorporates the NWAP and the NWAP as the functional equivalent of a state regulations. The Court however, asked as a matter of law, "is a DNR area land use plan a state statute regulation or local ordinance, for purpose of the ACMP?" By applying the "substitution of judgment" test to this issue (Hanley, 838 P.2d at 1233) the Court ruled that once an area plan is adopted state land must be classified in accordance with the plan, so by enforcing the NWAP the CPC would be enforcing state statute (AS 38.04.065(h)). Therefore, they concluded this is state statute and the CPC does have jurisdiction to review DNR's compliance with the NWAP.

*"procedural
requirements
eg. NEPA"*
The Superior Court decision also affirmed that the CPC review/petition process is limited to determining whether a reasonable basis existed for making the decision. In other words, the CPC is to investigate whether the agencies took a "hard look at the salient points when arriving at their decision, and did not make an arbitrary, capricious, or corrupt decision. The court's job is not to choose between competing inferences or evaluate the strength of the evidence."

The BSCRSA and Koyuk had argued that DNR and the CPC did not give "due deference" to the formal opinion of the BSCRSA. The Court ruled against them, saying that due deference has been satisfied if the "coordinating agency 1) carefully evaluates the comments of an affected coastal district with an approved plan and of any resource agency, and 2) issues specific responses to the comments not accepted by the coordinating agency." The Court further noted that after the petition is filed with the CPC, a de novo review occurs during which the due deference standard does not apply, because only the coordinating agency must give due deference to the district's interpretation.

*precedent
compliance*

The BSCRSA and Koyuk IRA Council are currently appealing this case to the Alaska Supreme Court.

*appealed to AK
Supreme Court*

CASE ANALYSIS

Both the Bering Straits CRSA coastal district and the State of Alaska view the Timber Creek Trapping Cabin proposal as a significant, precedent setting case. The coastal district believes that a decision to allow construction of the trapping cabin will establish an important precedent giving the state unrestrained authority to permit trapping cabins within the coastal district. Likewise, the state has expressed concerns that a denial of the trapping cabin permit would result in a precedent giving the coastal district unreasonable authority to prohibit trapping cabins over very large areas, including areas outside their district boundaries on state lands.

*precedent-
setting*

Many *types* of subsistence concerns were raised in this case, including increasing competition for subsistence resources (bringing more people to the area), disturbance to the environment which would drive animals away, stressing a subsistence resource by increasing the harvest of furbearers whose numbers have declined in the area, and conflicts with the manner in which subsistence activities have been traditionally carried out in the region. Collectively, the coastal district views these impacts as conflicting with the subsistence way of life.

Based on these concerns, the Bering Straits CRSA coastal district submitted an official comment letter in March 1992 to DNR which was coordinating the single agency review of the proposed Timber Creek trapping cabin application. The coastal district's letter cited four BSCRSA policies but did not provide an analysis of how the proposed cabin was inconsistent with these policies. Instead, the coastal district referenced the attached citizen's petition from Koyuk and a series of opposition letters from local villages, Native corporations and associations in support of the recommendation to find the project inconsistent with the BSCRSA program plan. The coastal district comment letter also quoted NWAP Management Guidelines for Trapping Cabins. However, they simply quoted the guideline language, and did not discuss how these guidelines related to the issuance of the trapping cabin permit.

feel!
The concerns of the BSCRSA are summarized in the petition from Koyuk residents -- "We feel that a cabin in the area would interfere with our subsistence lifestyle, as the area is a primary source of moose, caribou meat."

Other issues and concerns were raised in the comment letters and exchange of correspondence over the next year prior to issuance of the staff-level consistency determination. These included the potential for the project to: reduce the income of local trappers, seriously disrupt the general subsistence use patterns of local residents, cause overlap and competition with the trapping areas of the villages of Koyuk and Elim, cause an "influx" of cabin building in this area, cause overharvest in an area that local trappers

have been leaving alone in recent times because they feel that it does not contain an adequate number of furbearing animals, cause damage to the forest area and tundra due to removal and transport of timber, create a potential for the cabin to be used for big game guiding activities.

So, while the coastal district's opposition to this project is clear and is supported by specific issues raised in the several letters as cited above, there is virtually no record of an analysis of any concerns or issues for consistency with enforceable policies of the ACMP or BSCRSA plan.

On March 20, 1992 DNR regional staff issued a proposed consistency determination finding the cabin consistent with the ACMP with four stipulations. The stipulations clarified that use of the cabin was only for trapping, required the applicant to minimize disturbance to big game animals, address fire hazards, and minimize tree clearing. This regional-level consistency determination did not cite any ACMP or BSCRSA policies, did not provide any rationale for the decision or stipulations, nor did it address the BSCRSA or any other comments.

The coastal district requested elevation of the proposed regional-level decision. In May 1992, the directors partially reversed the regional-level finding and issued a decision that the coastal district views as successfully addressing their subsistence-related concerns. The Timber Creek case is currently under appeal to the Alaska Supreme Court, and the director-level decision is the only decision that satisfied the concerns of the coastal district. It is thus important to scrutinize what happened at the director-level and why.

Based upon a review of the staff issue paper prepared for the directors and the directors' decision (discussed above), as well as interviews with DNR staff that attended the elevation hearing and the coastal district, it seems that the directors did not spend much time addressing the consistency of the proposed cabin with coastal plan policies. Instead, the directors spent more time considering the consistency of the proposed cabin with the NWAP Management Guidelines for Trapping Cabins. This is not surprising given the absence of a clear analysis of the consistency of the proposed cabin with BSCRSA plan policies from either the coastal district or from regional staff. The NWAP Management Guidelines provided specific information on permitting trapping cabins. The directors apparently relied on the NWAP Guidelines and "found the permit application consistent with the ACMP, however, determined that a permanent shelter was not compatible with the terrain and local use of the area, proposed a temporary wall tent be used instead, and noted that tents are consistent with the historic use in the region and are less likely to discourage others from using the area."

This decision implies that the activity of trapping for personal use in this location is consistent with subsistence and ACMP policies, but that use of a permanent structure to conduct this activity is not consistent. This way of looking at subsistence, that it is not just traditional hunting and gathering, but also the manner in which the hunting and gathering is conducted, is a critical element in this (and other) cases. This broader view of subsistence allowed an outcome which satisfied the concerns of the coastal district.

Throughout this case (for it was appealed to many higher levels) the coastal district states more and more clearly that it is not getting "due deference" in the interpretation of its plan policies or in what subsistence means and is. The coastal district believes that Policy A-1 reflects the tone of the plan which is that the subsistence way of life, subsistence use of coastal land and water, is the most important use and activity in the region. The district believes that if others had given them due deference in what subsistence means to them and

in their plan, as well and how policy A-1 should be applied, as the directors apparently did, that a permanent structure could not have been allowed.

A difficulty with the directors' decision is that like DNR's decision, it did not cite consistency with any ACMP or BSCRSA policies as a reason for why the project was changed to a temporary structure, or as any part of their decision. This made it easier for the commissioners to overturn the director-level decision since an ACMP elevation is supposed to be based on a review of the proposed project's consistency with the ACMP.

"legislative" approach

It is significant that the later Court decision in this case ruled that it was appropriate to consider the consistency of the project with the NWP Guidelines as part of the ACMP consistency review. This appears to be what the directors did in coming up with an answer that satisfied the coastal district. However, the rationale for the directors' decision is missing, as it was at the regional-level.

This aspect of the Court ruling provides very different direction from that which has been built over time for the ACMP. While it has been long been considered appropriate for ACMP and State Area Plans to work together and set out policy direction consistent with one another (see NWP page 1-14), it has never been part of the ACMP consistency review process to assess the consistency of a proposed project with a State Area Plan.

In fact, in order to clarify the purview of the ACMP and to minimize conflicts between state agencies the state has always tried to carefully distinguish ACMP statutes and regulations from those of other agencies. This is why DGC and agencies have always been careful to rule first on a project's consistency with the ACMP, next issue a consistency determination, and then let state agencies separately review the project for consistency with their own statutes and regulations which are distinct from the ACMP. The Court's ruling blurs this distinction. This may be a dangerous ruling and precedent because if the ACMP program is viewed as overreaching and all encompassing it may ultimately lead to state agency resentment and antagonism to the program.

ACMP overreaching its jurisdiction! inter-agency conflicts

The trapping cabin applicant was not satisfied with the director-level consistency finding and requested elevation of this decision to the commissioners. At a June 1992 commissioner-level elevation meeting the directors' decision was reversed. The commissioner's issued a Conclusive Cabinet-Level Consistency Determination based on a detailed review of the four enforceable BSCRSA policies cited by the coastal district.

Why did the commissioners, after scrutinizing and using the BSCRSA plan policies, issue a consistency finding that in the opinion of the affected coastal district, did not protect its subsistence-related concerns? Likely reasons include the fact that the district did not communicate or document its concerns well enough, that the policies or plan did not have the information needed to address trapping and/or remote cabin impacts to subsistence, that the policies left too much room for interpretation, that two plans were involved made confused and complicated the issue, or that agencies did not giving due deference to the coastal district on the interpretation of its plan or policies.

Issues raised by this sequence of decisions are now considered in more detail.

The Coastal Plan

The coastal plan does not contain clear and predictable policy direction for the regulation of trapping cabins or other similar uses that might conflict with local subsistence uses. The plan attempts to strike a balance between the environment and development. While it seemed clear in this case that the coastal district viewed trapping cabins as largely

incompatible in subsistence use areas, its plan doesn't say so, and its text and maps do not provide clear justification for such a position.

The sections dealing with protection of Native Alaskan way of life are strong statements about overall goals. However they are not strategically implemented through carefully worded enforceable policies.

Boundary and jurisdictional issues played a key role in this case. The coastal district had difficulty (and ultimately failed) in showing that the proposed project fell within their jurisdiction. The parties disagreed about whether the coastal district was responsible for deciding if a project *outside* of the coastal district boundaries has a direct and substantial effect on a coastal resource, and is therefore subject to coastal plan review, and how that decision should be made. The coastal district asserted that the cabin was within a Permit Notification Area (PNA), which is defined in the coastal plan as an area where development *could* have a direct and substantial effect upon coastal resources. However, DNR argued that the cabin should not be considered within a PNA because it did not have a direct and substantial effect upon coastal resources, and was therefore not subject to coastal plan review. Furthermore, DNR asserted that the CPC should have made this decision independently before the consistency review occurred. The Hearing Officer ultimately disagreed with DNR and concluded that the project is within a PNA and that the decision was correctly made as part of the consistency review process. She felt that the coastal district submitted enough evidence to suggest that the cabin might have an impact on coastal resources.

The map boundaries for Important Use Areas (IUAs) designed to protect subsistence activities were also subject to disagreement. The coastal district interpreted IUAs on coastal plan maps more expansively than did DNR. The coastal district interpreted the IUA as covering the entire drainage basin of the Koyuk River. They argued that this broad area is important for protecting the habitat of fish and wildlife used for subsistence. DNR interpreted the boundaries narrowly, as including only the immediate area along the Koyuk River. The Hearing Officer ultimately decides that the map boundaries were to be interpreted exactly as shown on plan maps, and that the project is therefore *not* in the IUA. She decided that plan text did not support flexible interpretation of the boundaries by local districts based on local information and evidence.

Standards for fish and wildlife habitat protection in relation to impacts on subsistence were a weak area in the plan. The coastal district had real problems justifying the impacts to fish and wildlife that may result from the introduction of a cabin in this area. The impacts from the construction of one cabin will obviously be negligible, but the plan fails to explain the potential *cumulative* impacts of cabins in this area or to strategically justify restrictions on them. While it is apparent from comments and interviews that coastal villages see trapping cabins as a foreign foothold in their traditional subsistence hunting areas that will ultimately lead to more and more cabins, this concern is not reflected in the coastal plan or policies.

Relationships Between Plans

Uncertainty about the relationship between the DNR Northwest Area Plan and the Bering Straits Coastal Management Plan (BSCMP) and how they work together in the consistency review process was another major issue in this case.

The coastal district requested that the Hearing Officer consider policies in both the Bering Straits Coastal Management Plan (BSCMP) and the DNR Northwest Area Plan (NWAP) as part of the CPC petition hearing. DNR objected to this, stating that the CPC has no jurisdictional authority to consider DNR's compliance with its own plan. The Hearing Officer ultimately agreed with DNR stating in her decision that the NWAP plan is not a

"state statute, regulation or local ordinance" and is therefore *not* subject to CPC review. However, the Hearing Officer goes on to suggest that even if the CPC had jurisdiction to consider the claims of the coastal district, the issuance of the cabin permit by DNR would be consistent with the NWAP. She stated that the NWAP only prohibits the issuance of a trapping cabin permit *if the cabin will conflict* with existing trapping and subsistence activities, and traditional uses in the area of the cabin. The Hearing Officer found no evidence that the cabin would adversely impact subsistence or trapping activities, or would conflict with *traditional uses* in the area. The Hearing Officer acknowledged that the NWAP requires that the subsistence policies in the BSCMP be followed. However, the Hearing Officer stated that the cabin is also consistent with the BSCMP and is therefore consistent with the NWAP.

*no evidence
but does she
know no
impact?*

The Superior Court Judge reversed the Hearing Officer's ruling and stated that the NWAP is a "state statute, regulation or local ordinance" and is therefore subject to CPC review. He affirmed the Hearing Officer's decision that the trapping cabin is consistent with the NWAP.

Even with the court rulings the relationship between plans is still unclear for both agency and local district staff. The DNR NWAP is *not* referenced in the coastal plan. However, the NWAP clearly discourages the construction of trapping cabins in subsistence areas. This is not adequately explored in the application process or the Hearing Officer's decision.

The Hearing Officer and the court never addressed the NWAP management guideline that is clearly intended to discourage the intrusion of cabins into areas traditionally used for subsistence harvesting and uses. The Hearing Officer and Superior Court Judge focused on the *impacts* of the cabin rather than whether or not it met a traditional use criteria. They wanted specific language in the plans prohibiting cabins, not a prohibition derived from an interpretation of traditional uses. This is evident when the Hearing Officer repeatedly asked the coastal district if there is specific language in the Bering Straits plan that says cabins shall not be built in an important use area, or whether this is just an interpretation? The coastal district replied that this is an interpretation. The coastal district also stated that the intent of the local people is to have it interpreted that way..

*"traditional
use criteria"
"legislative"
interpretation*

The Consistency Review Process

During the consistency review there was no clear statement by the district of why it believed that the proposed cabin was not consistent with its subsistence standards.

Technically, the application process and consistency review was timely. However the responses from local districts did not zero in on the project's consistency with the coastal plan. A number of legitimate concerns were raised, but it appears that few were able to negotiate the plan, find the plan policies that were violated, and then rationally explain the inconsistency between the cabin and the plan.

*poor
articulation &
negotiation*

State agencies responding to the initial application sent very skimpy responses, with no real analysis of the coastal policies. State agencies did not seem to anticipate potential consistency problems with the cabin and address them up front. The issues associated with this case are not so clear that they only require a one paragraph response from state agencies. The Hearing Officer's extensive and complicated discussion of key issues during her review illustrates how poorly they were addressed and framed during the consistency review.

*poor
analysis!*

Both the Hearing Officer and the Superior Court Judge found that the coastal district was given an opportunity to participate in the governmental process involved in the issuance of the trapping cabin. However it seemed confused about its role in reviewing or issuing

✓ permits. It agreed that it had participated in the consistency review, but also indicated that DNR acted wrongly in issuing the permits over its objections because DNR was not listening to its interpretation of the plan. The coastal district seemed to be saying that DNR should have deferred to it because it prepared the plan and should have more say in how it is interpreted.

Plan Interpretation

The Bering Straits coastal district offered several interpretations of its coastal plan. When asked to clarify, it was defensive about its interpretation, and wondered why it had to justify everything. After all, it is **their** plan and they should be able to interpret it themselves -- "Isn't this what people in Fairbanks and Anchorage do?"

Although the coastal district tried from several different angles, it found it difficult to satisfactorily explain and document its concerns about impacts on local subsistence from allowing construction of a cabin. The district asserted that the building of a permanent cabin would deplete animal resources because it would be an attraction to other people and would lead to a reduction in animals needed for local people and their subsistence activities. In its opening remarks, the coastal district asserted that cabins clearly attract large numbers of outsiders and that this "is happening all over Alaska." The Hearing Officer wanted supporting documentation of this. The coastal district brought in local people to testify, but the Hearing Officer found the testimony unpersuasive. The Hearing Officer ultimately determined that the cabin would *not* serve as a magnet, and uses examples of the Camp Haven cabin and the Shaktoolik River cabin to prove her conclusion.

The coastal district also asserted that a cabin is contrary to traditional land uses in the area, and is therefore inconsistent with the coastal plan and should be prohibited. The coastal district wanted the applicant to use a tent instead of a cabin, because a tent is a more traditional use. The Hearing Officer heard testimony from local villages that tents have been traditionally used for trapping, not cabins. The Hearing Officer acknowledged that tents are more commonly used for trapping, but that cabins are also used. The Superior Court Judge noted that there are over 100 cabins on the Seward Peninsula and that some are used for trapping.

personal testimony not documented The Hearing Officer wanted to know specifically what impacts to animal habitat and movements would occur if a cabin were allowed in this area. The coastal district relied on personal testimony of local subsistence hunters to prove impacts. The Hearing Officer found the testimony to be, on balance, unpersuasive. This was a very weak area for the coastal district because the plan doesn't say much about the impacts of cabins or structures on habitat or movement of animals. With regard to cumulative impacts, the Hearing Officer made an attempt to analyze the cumulative impacts of cabins in this area. The Superior Court Judge finds this analysis "adequate," but also states that "to the extent future cabins (sic) permits are requested, a careful analysis of the cumulative impact of any additional cabin would be necessary."

The BSCRSA coastal coordinator noted that the BSCRSA CMP contains considerable plan text that discusses the importance of subsistence as the predominant way of life among residents of the region and the need to protect important fishing and hunting habitat to support subsistence activities and lifestyle. He felt strongly that this central theme should be considered when state agencies are uncertain about the correct interpretation and implementation of plan policies. Moreover, he feels that state agencies ignored important plan text that could help determine the coastal district's intent in drafting enforceable policies. The BSCRSA coastal district suggests that using plan text to interpret the meaning of plan policies, considering central themes within the plan, and listening (giving

✓

due deference) to the coastal district explanation of these matters is sorely needed in consistency reviews.

The BSCRSA is also concerned that state permittees in general have very little knowledge of life in rural villages, or understanding of the critical importance of subsistence as a lifestyle and for food supply. They seem to speak and act as if subsistence is a kind of chosen exotic lifestyle or recreational pursuit and have a hard time understanding the economic realities of native villages, including the limited options for economic development within villages, the lack of job skills among village residents, and the critical need to maintain a link with their traditional culture. This lack of knowledge is seen as leading to interpretations of plan policies that are inconsistent with the realities of village life.

little understanding

Communication and Cultural Differences

Testimony from the petition hearing illustrates the differences in culture, education and communication between some village residents and the legal system. The BSCRSA coordinator relied on discussions with village elders, hunters, and fishermen to gain information on the impacts of the proposed trapping cabin permit on subsistence uses. Information gained from these discussions is not easily translated into a sophisticated technical analysis of impacts that agency decision-makers prefer and pay attention to. It was difficult for Native speakers to dissect the natural world into pieces to make their points. For instance, villagers obviously knew the migration patterns of animals and were concerned about the impact of the cabin on these patterns. But rather than explaining these patterns or impacts in a studied or academic way, they told stories or used analogies. They knew they were having trouble convincing the Hearing Officer of their point, so they talked about practical, useful ways of living or hunting in the environment, hoping to create a relationship and context. The Hearing Officer was obviously frustrated with these roundabout responses, and found them unhelpful at best.

"traditional" knowledge vs. "scientific" knowledge

Villagers, and the district staff, on the other hand, could not understand why so much attention was being focused on micro issues and details related to the impacts of the proposed cabin and other cabins on the Seward Peninsula. They may have felt that this emphasis was intended to divert attention from what they saw as the real issues of non-locals moving in and competing with them for subsistence resources.

the real issues!

The Hazards of Appeals

One major lesson from this case is that the further it got into the petition process and court review, the farther it got away from the real issues of concern to the local district, with increasing risks of unfriendly interpretation. The district was concerned about the big picture of state land policy, and potential impacts on the subsistence way of life of encouraging increasing non-traditional uses. This was reframed by the Hearing Officer, who wanted to hear the details of how the cabin would impact subsistence. The further the case went along, the further it got away from the district's real concerns.

✓ resolve @ local level!

Similarly, the court's rulings on due deference argue for local districts making extra effort to get their concerns addressed early in the process, before they get to the petition or court stage. The judge in the Superior Court case clarified that deference to the district is only due in the first step of the process, when it initially interprets its own plan, and makes its consistency determination. Beyond that, when it gets into a petition or appeals process, the views of the district have no special weight. Again, this seems to argue for putting more effort up front in the plan and consistency review.

✓✓ address district concerns early in process!

Summary

This case seemed to turn on several basic issues. First, the proposed project was really outside the area over which the district had any real authority. Second, neither the coastal plan, nor the DNR plan specifically spoke to trapping cabins or prohibitions on them in areas used for subsistence. Third, the district was unable to satisfactorily demonstrate that the proposed cabin would have any significant adverse impacts on subsistence. This may have been due to lack of attention to cumulative impacts of increasing competition and potential displacement of local users.

This case became important to the district partly because it came to symbolize for the local community the basic issue of "outsiders" moving into the "subsistence territory" of local communities. They saw the issue in terms of an outsider gaining some foothold, in the form of physical improvements such as a cabin, that could give some advantage in the harvest of resources, and that could open the way for further incursions of this kind. This needs to be viewed both in the context of traditional forms of land-use (now centered from villages) and controls over access. The case was also important to the district (and to other rural districts) because it came to symbolize the issue of due deference to district consistency determinations.

The Superior Court found that because there are over 100 cabins on the Seward Peninsula, cabins must not be a conflict with traditional uses. However, one purpose of the NWAP Management Guideline was to **respond** to the problem of encroaching cabins. The NWAP language is an attempt to stem the tide of *new* trapping cabins. Of course, Native villagers use existing trapping cabins. But the fact that Native people use cabins doesn't mean that this is a traditional use nor that more should be built. The stated management guideline in the NWAP should be used to establish the policy against which future trapping cabin permits are reviewed. This is analogous to using a City's Comprehensive Plan and Zoning Code to review new development proposals ---just because there are multi-family homes does not necessarily mean that a proposal for another multi family home will be allowed, it depends upon the direction set out in the plan.

The following factors seemed particularly significant in explaining why the case did not have a satisfactory outcome from the district's perspective:

- a) The BSCRSA coastal district plan and policies did not specifically address trapping cabins.
- b) The coastal district plan did not cover all areas considered to be important for subsistence by coastal communities in the district.
- c) The district plan did not reference the Northwest Area Plan's trapping cabin policies, and it's relationship was unclear.
- d) The BSCRSA district provided little specific information during the consistency review supporting their claims about impacts on subsistence. Local knowledge was not documented in a way that makes it accessible during the decision process or subsequent appeals.
- e) Neither the coastal district, nor DNR, clearly identified the core issues during the consistency review process. Neither gave serious consideration during the consistency review to potential cumulative impacts on subsistence.
- f) The agencies, Hearing Officer, and Superior Court judge took a narrow view of subsistence, and of the subsistence goals of the district.

B. KOTZEBUE SOUND 58: NEARSHORE DREDGING

CASE DESCRIPTION

Proposed Project

In April 1996, Surf Food Products proposed an exploratory offshore gold placer mining project in Kotzebue Sound. The project was proposed for state waters (shoreline to three miles) along approximately 40 miles of coastline from Deering to Kiwalik (Figure 2). Mr. James Winkle, representing the company, submitted a coastal project questionnaire to DGC, placer mining applications to DNR, applied for a 401 certification from ADEC, and submitted applications to the Army Corps of Engineers (COE) for COE Section 10 and 404 permits. They proposed to dredge 15 acres with two, eight-inch suction dredges, using a fishing boat as a platform.

permits

This proposed placer mining project was within the coastal zone of the Northwest Arctic Borough and therefore under the purview of the Northwest Arctic Borough (formerly NANA) Coastal Management Plan (NWAB CMP). While the bulk of the project was not within a NWAB CMP "Important Resource Use Area" (IRUA) or "Sensitive Use Area" (SUA), the Inmachuk River IRUA is adjacent to the western tip of the proposed project and the eastern end of the proposed project is within the Eschscholtz Bay SUA (Figure 2).

adjacent to
IRUA &
SUA

Coastal District and Local Communities' Comments

Buckland IRA Council, the Buckland City Council, the Deering IRA Council, City of Deering, the NANA Regional Corporation Inc. (NANA), the Maniilaq Association, Kotzebue IRA Council and the Northwest Arctic Borough Coastal District (NWAB) opposed the project in letters sent in a timely manner to DGC. These parties sent comment letters directly to DGC and copied the NWAB so that their comments could be considered by the NWAB Planning Commission when it crafted its comment letter to DGC.

DGC responded to all commenting parties encouraging them to directly coordinate with the NWAB, the coastal representative for their area, since it is the NWAB coastal district that can officially ask for more information and whose comments will decide whether the project is consistent or inconsistent with the enforceable policies of the NWAB CMP. The Maniilaq Association and the City of Deering requested public hearings in Deering on the proposed project. The Kotzebue IRA and the NWAB requested a public hearing in Kotzebue to obtain public comment on the project.

coastal
district is
responsible
for review

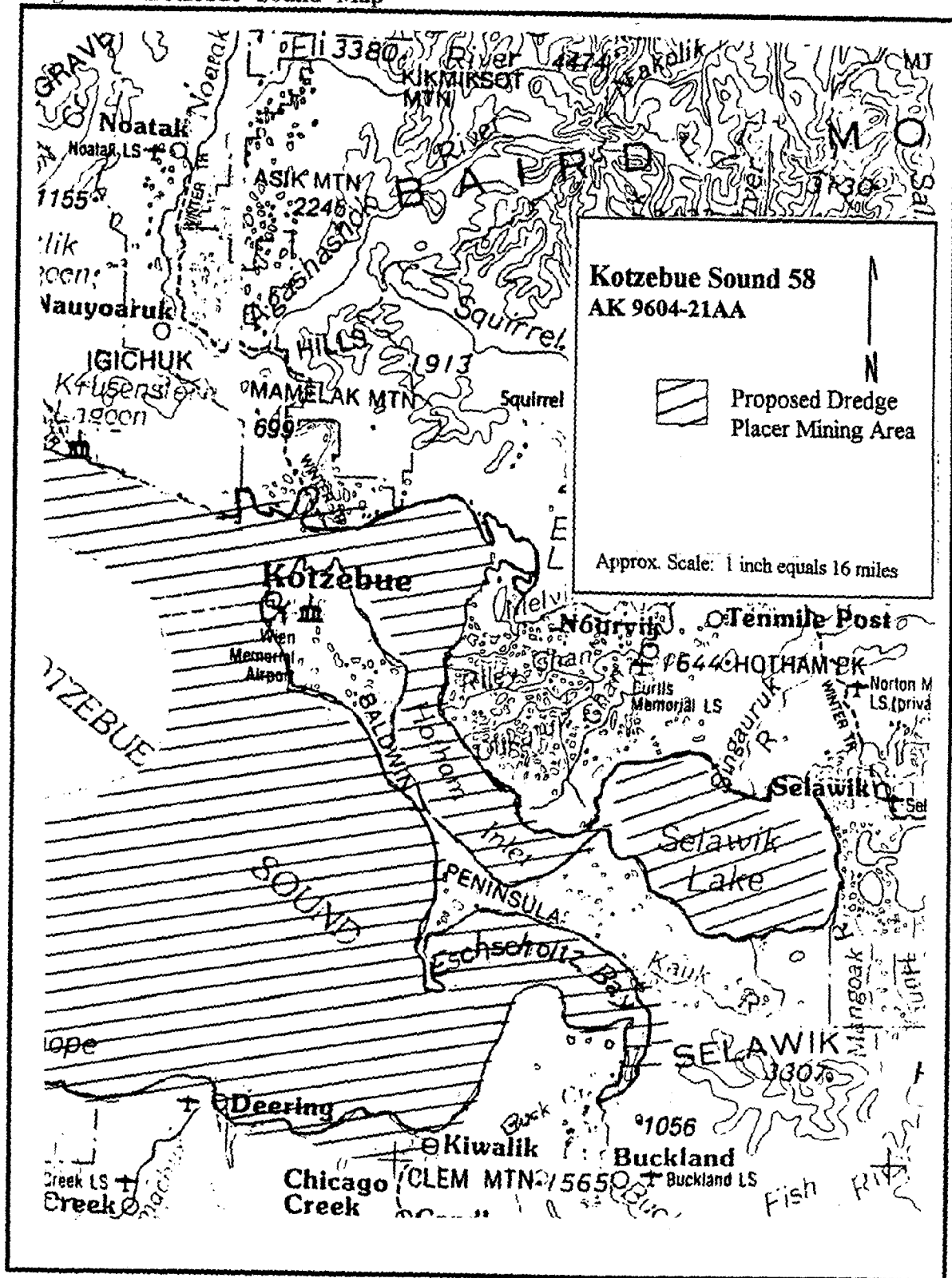
The NWAB Planning Commission findings comprise the substantive portion of the NWAB Coastal District comments. They noted that the proposed project was inconsistent with seven plus enforceable policies of the NWAB CMP, and provided an analysis of each policy's relationship to the project to justify this position. The substance of the NWAB comment follows:

more
explicit
analysis

A-1 Subsistence Use

Subsistence use of coastal lands and waters has traditionally been the primary and highest priority use of all lands and waters within the coastal management plan area; therefore, all other lands/water management uses and activities shall ensure that through careful planning, development, and operation of a resource extraction or development project, all steps will be taken to mitigate adverse impacts to subsistence resources and their use in accordance with policy G-6.

Figure 2. Kotzebue Sound Map



Analysis: The impacts by this project will be so broad, and the adverse impacts to subsistence resources and their use will be so extensive, that there is no practical way to mitigate the adverse impacts under policy G-6.

C-3 Habitat Maintenance

All habitat shall be managed so as to maintain or enhance the biological, chemical and physical characteristics of the habitat which contribute to its capacity to support living creatures.

Analysis: The proposed project will impact highly sensitive and valuable habitats used by residents of the NWAB for subsistence purposes. Such habitats will be significantly adversely affected by the proposed project. No alternative steps could be taken to provide for maintenance or enhancement of the habitats and still allow the project to take place.

C-4 Offshore Areas

Offshore areas shall be managed to maintain or enhance fisheries, and marine mammal subsistence harvesting.

Analysis: The proposed project will have a significant adverse impact to the fisheries and marine mammal subsistence harvesting in the area of the project. The project will take place in the offshore areas primarily used by borough residents for marine mammal subsistence harvesting and other fisheries. No conditions on the project as proposed can appropriately avoid the significant adverse impacts to the offshore areas.

G-4 Compatibility

To the extent feasible and prudent, activities on and uses of coastal lands and waters shall be compatible with adjacent land and water uses.

Analysis: The activities of coastal lands and waters adjacent to the proposed project area primarily include subsistence marine mammal hunting and subsistence fishing activities. Such traditional, long-standing, activities are not compatible with an offshore dredging project with the proposed scope, size and impact of Kotzebue Sound 58.

LL Inmachuk River Important Resource Use Area/LL-1 Subsistence

Use and activities shall not significantly interfere with the following activities:

- (a) salmon and char fishing (July-September)*
- (b) moose hunting (September-March)*
- (c) furbearer trapping*

Analysis: The Inmachuk River Important Resource Use Area begins at the mouth of the Inmachuk River. The project will take place directly in front of the mouth of the Inmachuk River. The project will cause significant adverse impacts to the anadromous fish that are meant to be protected by the designation of the Important Resource Use Area.

CC Kobuk/Selawik Lakes Important Resource Use Area/CC-2 Fish

Industrial and commercial activities and uses requiring water intake or discharge of effluent shall be sited, designed, and operated to minimize impacts to larval and juvenile fish. Activities and uses shall be sited, designed and operated to minimize impacts on anadromous fish migration and overwintering fish populations.

Analysis: The map submitted with the application shows that the project will take place in the Kobuk and Selawik Lakes. The project cannot take place within this area with being inconsistent with this policy.

CC-3 Alternative Sites

To the extent feasible and prudent, entities proposing uses and activities not related to subsistence, commercial fishing, and biological resource management shall locate such activities at alternative sites outside the area.

Analysis: This project cannot be sited within the Kobuk and Selawik Lakes Area.

Other Areas

Cape Espenberg Important Resource Use Area (DD), Sisoalik Spit Important Resources use Area (AA), Cape Krusenstern Important Resource Use Area (BB), and the Eschscholtz Bay Restricted/Sensitive Resource Area (GGG).

Analysis: For the same reasons stated above, the project is inconsistent with the policies associated with these special areas.

Agency Comments

In a June 18, 1996 letter to DGC the Alaska Department of Fish and Game (ADFG) found the project consistent with the ACMP and NWAB CMP subject to four stipulations. These ADF&G stipulations

- 1) prohibited dredging within 30 meters of MLLW or a within one mile radius of the mouths of anadromous fish streams (16 streams within this and the Port Clarence 10 project areas were listed);
- 2) noted that if mining or a turbidity plume occur within 90 meters of MLLW, the permittee shall coordinate with ADFG to avoid or minimize conflicts with fish migration and subsistence fisheries -- this stipulation was justified based on the ACMP Subsistence and Habitat policies;
- 3) regulated the 'turbid units' (NTUs) of turbidity plumes and the percent solids in the discharge plume, based on the ACMP Air, Land and Water Quality Standard.

The ADFG comment letter concluded by noting that while ADF&G believed the proposed small-scale exploratory dredging operation complied with the NWAB coastal district policies, they deferred to the NWAB for its interpretation.

In a June 19, 1996 letter to DGC, the U.S. Fish and Wildlife Service (USFWS) expressed concerns about the effect of dredging and provided detailed information about the potential adverse impacts from dredging on fish and wildlife. They noted concerns about impacts to marine mammals, waterfowl, anadromous and marine fish, and invertebrates. They recommended that the proposed activity be prohibited from areas near Kotzebue Sound seabird colonies and herring spawn habitats, as well as from Cape Krusenstern National Monument. They found that the proposed activity could be permitted in other areas only in conjunction with a monitoring program adequate to document the magnitude and duration of changes to water quality, benthic communities, and other fish and wildlife resources. They also recommended that in areas authorized for dredging, the activity should be timed to avoid migrating marine mammals, especially beluga whales, and their calving areas.

Their letter specifically referred in several places to the subsistence values of these resources to communities in Northwest Alaska. After noting that spotted, ringed and bearded seals, walrus and beluga whales could be affected by reduction of prey, interference with feeding from increased turbidity, and disturbance along migration routes and in calving areas, it went on, "These species provide important subsistence resources for local residents, so effects on subsistence use is also a concern."

ADFG
deferred to
NWAB!

It also noted that a variety of migratory waterfowl could be affected by the proposal, and that "potential food chain effects on these species, as well as the disturbance effects resulting from the noise and human activity of suction dredging, could impact local subsistence activities." The letter also mentioned potential impacts to herring spawning and salmon migrations in the Kotzebue Sound area, but did not tie these to subsistence uses.

How!

The U.S. Department of Commerce National Oceanic and Atmospheric Administration National Marine Fisheries Service (NOAA NMFS) and DNR SHPO had no objections to the proposed dredge mining project. ADEC issued a 401 Certification for water quality with the stipulation that the applicant obtain, and operate in compliance with, an NPDES permit for placer mining.

None of these agencies referred to the NWAB coastal plan, maps, or policies in their comments.

Consistency Determination

On June 28, 1996, DGC issued a Proposed Consistency Determination explaining that the state did not concur with Surf Food Products' certification that the proposal was consistent with the ACMP. The letter cited the NWAB determination and analysis finding the project inconsistent with six enforceable policies in the NWAB CMP. It did not provide any additional analysis or comment. There is no record of a response to the Proposed Consistency Determination.

On July 15, 1996, DGC issued a Final Consistency Determination explaining that DGC had completed coordinating the state's review of the proposed dredge mining operation for consistency with the ACMP. The final consistency determination reiterated the proposed determination. On July 22, 1996, the COE notified Mr. Winkle that COE permits were being denied because DGC had found the project inconsistent with the ACMP.

CASE ANALYSIS

In this case the NWAB found a major proposed project inconsistent with its plan, and this finding was upheld in the agency review. This was a successful outcome from the coastal district's perspective. They consider subsistence-related concerns to be addressed satisfactorily in this case.

Subsistence concerns played a major role in the response and reaction to the proposal by the NWAB coastal district and local communities. The NWAB coastal district referenced at least seven specific policies from their plan in their comments. They included brief, somewhat superficial analyses of the relationship of the proposed project to each of these policies, emphasizing likely impacts on fish and wildlife resource important for subsistence.

At first glance, these comments and the policies they reference appear to offer little substantive basis for prohibiting the project. The NWAB analysis did little to explain how the proposed project would impact fish and wildlife, their habitats, or subsistence uses that depend on them. Furthermore, most of the listed NWAB enforceable policies offer an "out" by allowing mitigation, alternative steps, or conditions that may be applied to a project to achieve consistency under the plan.

mitigation provision

However, the proposed project included areas within the NWAB CMP Inmachuk River Important Resource Use Area (IRUA) and the Eschscholtz Bay Sensitive Use Area (SUA).

These are two of the three most important special areas (AMSAs) identified by the NWAB plan.

The most persuasive policy is barely noted in the comments. The section "Other Areas," at the end of the comments, mentions the Eschscholtz Bay Restricted/Sensitive Resource Area (GGG). The analysis fails to point out however, that policy GGG 1 prohibits resource exploration and extraction in Eschscholtz Bay. It seems surprising that such a significant policy, supporting a major part of the district's position, was not given more prominence in the analysis.

Although portions of the project would have occurred in special areas, much of it was proposed for areas not covered by such designations. This raises the question of whether there might have been a different outcome if the applicant had responded to district concerns or the consistency determination by amending its proposal to stay out of the two special areas. Most of the NWAB policies cited in the comments provide for mitigation, alternative steps, or conditions that may be applied to a project to achieve consistency under the plan. For example Policy A-1 states that "all steps will be taken to mitigate adverse impacts to subsistence resources...." Policy CC-2 notes that projects must be "sited, designed, and operated to minimize impacts...."

On the other hand, Policy C-4, which requires that "Offshore areas shall be managed to maintain or enhance fisheries and marine mammal subsistence harvesting" was used by the NWAB to argue that "no conditions on the project as proposed can appropriately avoid the significant adverse impacts to the offshore areas". Again however the NWAB offers little in the way of evidence in its comments to support this finding.

Other agencies, including ADF&G and NOAA indicated that the project would be consistent with the addition of certain stipulations. However ADF&G noted that while it believed the proposed small-scale exploratory dredging operation complies with the NWAB policies, they defer to the NWAB for its interpretation.

little evidence provided

The NWAB contended in its analysis that no mitigation was possible to prevent adverse impacts. However its comments are essentially conclusions, and provide little analysis or reference to specific evidence to back up these assertions. They do not refer either to scientific data, such as the comments of the state and federal resource agencies, or to specific local knowledge.

scientific evidence!

The comments submitted by the USFWS and ADF&G appear to have played a major role in the case. They provided scientific data and observations about the presence of fish and wildlife in the area, their habitat and cited studies illustrating impacts on these resources from the type of project proposed. The USF&W analysis explaining the potential impact of the dredge mining operation on fish and wildlife appeared to play a key role in the DGC finding of inconsistency. The USF&W letter provided backup for the district's argument that potentially significant adverse impacts on subsistence resources and fish and marine mammal habitat would result from the proposed project.

However, the comments of ADF&G and USFWS, while focusing on the issue of potential impacts to fish and wildlife, including species used for subsistence, did not tie their comments or concerns to resources documented in the NWAB Resource Inventory, maps, or to the NWAB SUA policies.

This case suggests that scientific data from an agency such as ADF&G or USFWS can be a major support for coastal districts attempting to show impacts of a project on subsistence. Given the lack of specific data or support for the conclusions drawn in the NWAB

comments, it seems likely that DGC reviewers drew on the agency's scientifically supported concerns about impacts on fish and wildlife in deciding to agree with the NWAB.

The NWAB CMP clearly conveys the importance of subsistence to local communities, and the significance of the area's land and waters for subsistence resources. Its Introduction notes that "The pursuit of subsistence activities continues to provide the foundation for traditional cultural values and community and regional economies."

Later the plan states

Subsistence hunting, fishing and foraging is a matter of survival to the people of the area. This strong relationship between the people of the region and their environment, and the renewable land and sea resources provides the framework for this plan.

The NWAB CMP provided an important context for the district's comments on the proposed project, even though it was not explicitly referred to. The plans resource inventory and analysis clearly documented areas of fish and wildlife abundance, habitat and areas where use of these resources is critical for subsistence to people of the region. The plan's maps of these areas and accompanying narratives document them as important for a wide range of fish and wildlife important for subsistence. For example it notes that the Inmachuk River IRUA is important for chum, pink salmon and arctic char fishing for the community of Deering. It identifies the Eschscholtz Bay SUA as particularly important for beluga whaling and sealing for the communities of Selawik, Deering, Buckland, Noorvik and Kotzebue. And it notes that Kobuk and Selawik Lake are particularly important for fishing, sealing, and waterfowl hunting for residents of Kotzebue, Selawik, and Noorvik.

This "local knowledge," although well documented in the plan, played little documented role in the consistency review and outcome of the case. There were numerous comments from local communities and organizations, including letters from Native village governments, IRA councils, Native organizations and NANA Corporation. However, most of these simply stated positions, and asserted that harm would occur, without any supporting documentation of local knowledge. The main role of these types of communications from local communities and other organizations seems to be to serve notice that subsistence is important and a possible conflict with the proposed project. This appears to be the first step in asserting and documenting local knowledge as identified in the recent ACMP "309 Assessment."

positions
stated w/o
evidence
presented
serve notice of
important
issues

This seems surprising in view of the abundance of information about subsistence uses in this area, and its stated importance. Local hunters clearly have considerable knowledge about the seasonal distribution of marine mammals and other fish and wildlife species, as well as observations and ideas about the effects of disturbance on their distribution and abundance. However, none of this specific local knowledge is reflected in the case documents or the final decision.

The NWAB Planning Commission provided one forum for bringing local knowledge to bear on the project, although little information about the discussion that occurred there is available. Certainly having the Planning Commission review the project ensured a significant degree of local participation in the review. From the local district's perspective, comments from local communities and the position taken by the Planning Commission served as important information about the significance of subsistence uses in the area, and about local opposition to the project.

The fact that potential direct impacts to fish or wildlife species were at issue seems to have played an important role in the way that subsistence concerns were dealt with in this case.

These types of potential impacts were also of major concern to resource management agencies, including ADF&G and USFWS, who commented in detail on the project. This enabled project reviewers to tie together local concerns about impacts on subsistence with scientific data about likely direct harm to biological resources.

It is only possible to speculate about the role played in this case by the applicant's failure to offer any alternatives or mitigation measures. If the applicant had come back and made an effort to negotiate, to reduce the area or to stay outside the special areas for example, would the district or state have changed their positions? Given the emphasis in the plan's policies on providing for mitigation it seems possible that there might have been a different outcome if the applicant had taken more vigorous measures to pursue elevations or appeals.

In summary, Surf Food Product's proposal to conduct offshore dredge prospecting was found inconsistent with the NWAB coastal plan, largely due to concerns about the project's impacts on marine resources used for subsistence. The NWAB took the position that the project was inconsistent with at least seven policies in its CMP, including subsistence policies. It was satisfied that DGC upheld its findings in the state's consistency determination. Major factors contributing to this outcome were:

- 1) the NWAB coastal district's clear use of its policies along with an analysis, albeit simple, that related these to likely impacts;
- 2) the fact that the NWAB has subsistence zones (IRUA and SUA), that the project was partly within an IRUA and a SUA, and that there are clear policies that prohibit activities that conflict with subsistence within the Escholtz Bay SUA;
- 3) that the USFWS and ADF&G submitted comments that provided scientific data and observations about the presence of fish and wildlife in the area, their habitat and cited studies illustrating impacts on these resources from the type of project proposed;
- 4) that the NWAB CMP resource inventory and analysis clearly documented areas of fish and wildlife abundance, habitat and areas where use of these resources is critical to people of the region; and
- 5) that the type of subsistence impact of concern was a direct impact to fish or wildlife species rather than an indirect impact such as increased competition for subsistence resources.

While the project's outcome did successfully protect subsistence resources of concern to the coastal district, potential weaknesses identified in this case are that:

- 1) "local knowledge" appears to have played little documented role in the outcome;
- 2) the policies in the plan that appear to be most relevant and strongest did not receive as much attention as they could have; and
- 3) ADF&G and USFWS, while providing helpful scientific comments, did not directly tie their comments or concerns to resources documented in the NWAB Resource Inventory, maps, or to the NWAB SUA policies.

no appeal!

C. WINKELMAN: TRAPPING CABIN

CASE DESCRIPTION

This case involves two decisions by the Department of Natural Resources (DNR), ten years apart, concerning a Trapping Cabin Construction Permit in the Bristol Bay CRSA. The first request to DNR was approved in 1986; the second request, for a permit renewal, was approved in 1996. This case provides an opportunity to examine how trapping cabins permits are reviewed and adjudicated, and how the Bristol Bay CRSA (BBCRSA) has responded to them.

In October 1985, Donald Winkelman applied for a State of Alaska Department of Natural Resources Division of Land and Water Management (DL&WM) Trapping Cabin Construction Permit to construct three trapping cabins at three different sites along a trap line on the King Salmon River above its junction with the Nushagak River (Figure 3). The proposed permit area was subject to the 1984 state Bristol Bay Area Plan (BBAP). The BBCRSA was developing a coastal management plan but it was not yet in effect.

On the permit request Mr. Winkelman listed his current trapping license number, and responded that he had regularly used an established trapline. He also provided evidence of regular use of the trapline in the form of a statement from the local Alaska Department of Fish and Game (ADFG) game biologist. This statement noted that Mr. Winkelman had actively worked at commercial trapping in Unit 17 for the past four trapping seasons, and that his trapping area was located on the King Salmon River. The permit would authorize use of the cabins for a ten year period.

The application was distributed by DNR to the Bristol Bay CRSA, 11 state agency offices, and 20 Native village governments, corporations or organizations. It was included with four other trapping cabin construction permit requests for the Bristol Bay area. The cover memorandum from DNR noted that Winkelman and another applicant who both requested more than one site had been requested to justify their need, citing provisions of the Bristol Bay Plan.

The Bristol Bay Coastal Resource Service Area did not directly oppose issuance of the Winkelman permit, but requested further review of the application to verify that Mr. Winkelman regularly trapped in the area where he proposed to construct a trapping cabin. Specifically, the CRSA noted that a local resident claimed that he had been trapping in the area for a number of years, and that Mr. Winkelman had trapped in the area for less than one year. The CRSA also questioned the applicant's need for three cabins.

The DNR Division of Resource Allocation also questioned the need for three cabins on a trapline that was only eighty miles in length and could be traversed in a relatively short time by snowmobiles. The DNR Office of History and Archaeology requested an archaeological survey of each of the proposed cabin sites consistent with requirements in the Bristol Bay Area Plan which requires appropriate protection of historic and cultural resources.

ADF&G had no objections, and recommended that the proposed cabins be found consistent with the Alaska Coastal Management Program (ACMP). The DNR Division of Oil and Gas also had no objection to any of the proposed cabin sites.

Winkelman Trapping Cabin
(ADL 222363)

▲ Approximate Location of Proposed Cabin

Approx. Scale: 1 inch equals 11 miles

Proposed Winkelman Trapping Cabin

SHOTGUN HILLS 3388'

BUTCH MTN. 1721'

TIKCHIK MTN. 2742'

King Salmon River

Klutuspak Creek

Nushagak

Vukpalik

1979 • SLEITAT M

Bristol Bay Borough

Bristol Bay CRSA

In response to the concerns from BBCRSA and state agencies, Mr. Winkelman revised his application to request only one cabin for his trapping activities. In March 1986, the DL&WM issued Mr. Winkelman a permit for one trapping cabin. The permit contained standard stipulations regarding the cabin's construction and use as well as conditions designed to protect fish and wildlife habitat.

Ten years later, in January 1996, Donald Winkelman requested that the DNR Division of Land (DL) renew his trapping cabin permit for another ten years. He had constructed a cabin on the upper King Salmon River under the terms of his permit. With the ten year permit due to expire he wanted to renew it for another ten years.

Because this was a permit renewal it did not require an individual consistency review based on the DGC project renewals and modifications policy. Trapping cabins are on the ACMP B-List, which means that a consistency review of this activity has already occurred; however there is an exclusion for the Nushagak-Mulchatna planning area. The DNR Division of Lands, Southcentral Region, provides an advisory comment period on trapping cabin and other permits. In February 1996 the Division of Lands sent notice of Mr. Winkelman's request for renewed trapping cabin permit to the BBCRSA, the Nushagak Fish and Game Advisory Committee, and state agencies.

Two new plans had been adopted by the BBCRSA since issuance of the original 1986 permit that were now applicable to the permit renewal. These were the Bristol Bay Coastal Resource Service Area Coastal Management Plan (BBCRSA CMP) and the Nushagak and Mulchatna River Recreation Management Plan (NMP). The NMP was jointly prepared by the BBCRSA, DNR and ADFG. It was adopted by the BBCRSA as an Area Meriting Special Attention (AMSA) Plan and was adopted by the DNR specifically to guide the department's review of development projects within the BBCRSA. The NMP provides a detailed analysis as well as management guidelines for land uses that impact subsistence and recreation in the Nushagak and Mulchatna River drainages.

The notice distributed by DNR contained copies of Management Guidelines from the Nushagak-Mulchatna Plan. The NMP designates the King Salmon drainage, where the cabin is located as a primitive unit, where trapping cabins and other temporary and permanent facilities are prohibited (Management Guideline 6.1). However the plan specifically provides an exception for the Winkelman cabin (Management Guideline 12.3):

Renewal of Existing Trapping Cabin Permit. A trapping cabin construction permit was granted in this unit in 1986. Renewal of the existing trapping cabin permit may be allowed in accordance with AS 38.95.075.

The BBCRSA recognized that the NMP allows this permit to be renewed if the applicant were adhering to the conditions of the permit. Because the CRSA believed the conditions required by this statute were not being met they opposed renewal of the permit. Specifically they questioned whether the applicant could prove continued use of the trapline and cabin at least during alternating trapping seasons. The BBCRSA listed several reasons for recommending that the permit be denied:

1. According to ADF&G Sealing Certificates, the only year the applicant trapped from his cabin in the past four years was during the 1991 season.
2. From 1993 through 1995 Mr. Winkelman trapped along the Lower Togiak River, a considerable distance (over 200 miles) from his cabin on the King Salmon River.

3. Mr. Winkelman moved to Togiak several years ago and no longer resides in Koliganek. The village of Koliganek is located about forty miles down river from the confluence of Nushagak River and the King Salmon River. Mr. Winkelman lived in Koliganek when he applied for and received a trapping cabin permit.

4. The Nushagak River Villages that use this area for winter subsistence hunting have not witnessed any trapping activity from his cabin the last several years.

In response to these concerns, Mr. Winkelman forwarded fur receipts from animals trapped in the cabin area, and a letter of support from an area resident who confirmed that he had used the cabin for trapping activities at least during the past two and a half years. Based on discussions with DNR staff he also provided DNR with a detailed chronology and supporting documentation of his use of the cabin over the last ten years.

Based on Winkelman's submissions, DNR sent a letter in June, 1996 to the BBCRSA indicating its intention to approve the renewal of Mr. Winkelman's trapping cabin permit. The letter stated that this was not an easy decision for DNR and is complicated by the statutes and regulations that originally enabled trapping cabin authorizations. At the time of the cabin's initial authorization no proof of continual use of the cabins was required. Rather, cabin users only had to prove that they used the cabin once during alternating trapping seasons, (once every two years). Mr. Winkelman met this criterion.

legitimate conclusion

The DNR letter concludes by noting that this case is prompting the agency to make changes to the trapping cabin permit program which will require better proof of cabin use, and require that this proof be submitted to DL once a year throughout the course of the ten year authorization.

During the course of this permit review and final permit issuance, DNR and the Bristol Bay CRSA discussed the concerns raised by the CRSA and DNR's reasons for renewing the permit and other potential improvements to the trapping cabin permit program. In June, 1996, a permit incorporating the changes mentioned in the above letter from DNR was sent to Winkelman for his signature. In response to further correspondence from BBCRSA suggesting changes to several conditions for trapping cabin permits, DNR sent a revised permit to Winkelman which was signed and issued in November, 1996.

CASE ANALYSIS

In 1986 the BBCRSA district had few tools to address the broad concerns of local villages concerning trapping cabins, other state land disposals, and increasing recreational uses of lands traditionally used for subsistence. Bristol Bay villagers have long been concerned about increasing competition for wildlife and fur bearers by people from outside the region. They are concerned about the presence of cabins in areas they have traditionally used for subsistence and trapping, and whether these will give outsiders an advantage over village trappers.

The Winkelman application was one of a series of state land disposal actions that triggered efforts by the BBCRSA and other groups in the region to seek ways to gain more influence over land use decisions. It was not clear to the CRSA whether or not his application raised real subsistence concerns, or whether it mainly reflected the broader concerns about land use changes.

present

Although the Bristol Bay CRSA raised questions about whether Mr. Winkelman's application met the requirements of the trapping cabin permit, the district had little specific

information on which to base opposition to the permit request. Due to the area's remoteness and difficulty of access, there was no real evidence of any conflict with other users. The applicant met the very minimal, limited requirements of the permit, and the supporting letter by the area game biologist lent credibility to the application.

One issue in this case is the relationship between the ACMP and other land use planning processes. BBCRSA actively participated in other land use planning processes for more than ten years, working to shape them in order to accomplish protections for subsistence uses that they did not see as feasible through the BBCMP by itself.

*involved in
other land use
planning processes*

The Bristol Bay Area Plan, providing overall direction for managing state lands, had been completed in 1984. The BBCMP, approved in 1987, provided direction for managing resources in coastal areas. Both plans highlighted the importance of recreation and fish and wildlife values for commercial and noncommercial uses (including subsistence and recreation) in the Nushagak and Mulchatna river drainages. Both plans directed DNR and BBCRSA to do additional planning for public use management in the region, and for the BBCRSA to prepare an AMSA plan.

The BBCRSA sought special funding for studies of land use conflicts in the region through their local legislator, and helped bring pressure to bear on DNR and ADFG to engage in a more detailed land planning effort for the Nushagak-Mulchatna drainage. In response to these efforts, and to public concern about subsistence use and increased recreational use, DNR, ADFG, and BBCRSA signed a cooperative agreement in 1987 to prepare the Nushagak Rivers Recreation Management Plan (NMP), which was completed in 1990.

The NMP provided for a variety of land use categories that help reduce conflicts between subsistence and recreation users. Certain areas were designated as "primitive", where settlement and construction of permanent facilities are prohibited. The NMP includes specific language about trapping cabins, which are prohibited in primitive units. They are allowed in semi-primitive and semi-developed designated management units on a case-by-case basis, if consistent with management intent for these units, the few guidelines specific to these units, and siting criteria, in addition to the statute and regulations guiding the trapping cabin program.

Despite the permit renewal, the BBCRSA nonetheless views this outcome as satisfactory. They had pursued a number of trapping cabin issues with the DNR over the preceding year, expressing similar concerns about potential abuses of the program. From the district perspective the June 18 letter, and the revisions to trapping cabin policies made by DNR, went a long way toward addressing these concerns.

The NMP appeared to assist the district and agency in addressing the Winkelman cabin permit issue. The plan would prohibit a new cabin from being constructed in this unit, and it seemed to raise the sensitivity of DNR to the concerns of the BBCRSA even with this permit renewal. A second significant outcome of the relationship developed between coastal district and state agency is that this (and other permit reviews) prompted DNR to make changes to the permit process.

*Use of other
plan*

The case raised issues specific to the Trapping Cabin permit system, and the standards that applicants must meet under this program. One is whether state law requires the permittee to prove that the cabin was used continuously throughout a trapping season, or whether it just requires the permittee to show up for one day of the trapping season every two years.

The BBCRSA has addressed these issues by continuing work on developing a packet of overall suggested changes to the trapping cabin permit program, as well as reviewing and

recommending changes to specific permit stipulations. Among the changes considered for recommendation by the district:

- 1) instituting a standard form letter that makes clear to applicants what information is required,
- 2) reorganizing/clarifying permit conditions (for example, actual permit conditions from adjudication guidelines/criteria and advisories. These include existing conditions in the permit that DNR is willing to monitor but which fall under DEC's authorities to enforce such as solid waste disposal);
- 3) possible changes to the regulations and statute if necessary.

BBCRSA staff say they have preferred to avoid statutory changes and focus on things that can be addressed by establishing a better standard of information and review. Another option being considered is development of additional guidelines in the plan or position paper (similar to the one done on temporary camp permits - a separate issue that they believe has worked out well) that clarifies how trapping cabins will be adjudicated for purposes of the NM plan.

Although they felt that Winkelman was probably technically in violation of permit conditions the BBCRSA decided not to pursue the issue further because the plan guidelines were fairly clear about where trapping cabins are allowed, and people's concerns had more to do with the interpretation of the trapping cabin permit statutes and regulations. The CRSA Board and staff felt these were better addressed through DNR's advisory review process. They also wanted to avoid the contentious issue of whether the district had the right, through the NMP, to interpret DNR's statutes and regulations, one of the issues they hoped was being addressed in the ongoing ACMP Assessment.

In response to the issues raised by the district in the Winkelman case, the Southcentral Region of the Division of Lands made major changes in the permit requirements. All renewed trapping cabin permits will now require continuing proof of use including a combination of:

- tax returns or fur sale receipts showing income derived from trapping;
- sealing certificates
- fur tanning receipts;
- copies of official records maintained by the Dept. of Fish and Game or the Dept. of Public Safety, Div. of Fish and Wildlife Protection;
- witness statement(s);
- a signed and notarized affidavit from the local Fish and Game Advisory Committee.

Division of Lands staff also indicated strong support for a positive working relationship. In his June 18 letter of response to the district on the Winkelman case, Rick Thompson, SCRO Regional Manager, wrote

I see this as a continuation of our coordinated management effort in the Bristol Bay area. ... We have been very successful working together on other trespass issues and I believe that we can bring that established teamwork to bear on this issue as well.

In summary, DNR approved both Winkelman's original Trapping Cabin Construction Permit in 1986, and his permit renewal request in 1996 despite district concerns. The BBCRSA raised questions about the original application, but did not actively oppose it. It did oppose renewal of the permit, but was reasonably satisfied with the outcome, particularly because DNR revised its procedures to address district concerns about the permitting process.

Major factors contributing to the outcome of the renewal decision were:

1) DNR's interpretation that under the terms of the statute and regulations under which Winkelman's permit had originally been issued, he was only required to provide some affirmation that he had used the cabin once every two years rather than substantial evidence of continued use of the trapline and cabin over the period of the permit.

2) Until the series of renewals that came up in 1996, little attention had apparently been paid to the issue of the continued use standard.

3) The fact that this case involved a renewal instead of an original permit.

4) The district's strategic approach to working with, rather than confronting DNR, and the credibility they had established over time in working on a range of issues.

relationships.
| ✓

The district's long term commitment to working with DNR and other agencies to influence them and move them toward the local region's perspective also seemed to play a significant role in the case. This included a ten year effort to influence the DNR land planning process, and to create the NMP as both a component of the DNR area plan and as an AMSA. Similarly, the district has worked to modify the trapping cabin program, an approach that led to stricter and more consistent guidelines for future cases. The district views this long term working relationship with the agencies as an important asset, to which this case contributed.

D. GOODNEWS BAY: OFFSHORE PROSPECTING

CASE DESCRIPTION

Proposed Project

In 1982, Karin Sheardown filed 22 Offshore Prospecting Permit (OPP) applications with the State of Alaska Department of Natural Resources (DNR) Division of Mining (DOM) covering 52,878 acres of state tide and submerged lands in the Platinum and Goodnews Bay area. Platinum and Goodnews Bay are located on the southwest coast of Alaska, north of Cape Newenham (Figure 4). About half of the permit applications were in Goodnews Bay. The other half were outside of Goodnews Bay along the Kuskokwim Bay/Bering Sea shoreline. The proposed mining operation is subject to the Cenaliulriit Coastal Management Plan (CCMP) and the DNR Bristol Bay Area Plan (BBAP). The project consistency review was coordinated by the northern region DNR DOM because DNR permits were the only permits required.

Due to departmental budget constraints, Sheardown agreed to contract with DNR to prepare and pay for a Resource Assessment Report (Assessment Report). The Assessment Report was to identify the impacts of platinum exploration, and mining operations, and mitigation measures, and to form the basis for DNR's Best Interest Findings (BIFs) and DNR's determination of the project's consistency with the Cenaliulriit CRSA Coastal Management Program (CMP). Soon after the contract was signed, DNR arranged and held public meetings in Goodnews Bay and Platinum to explain the permit process.

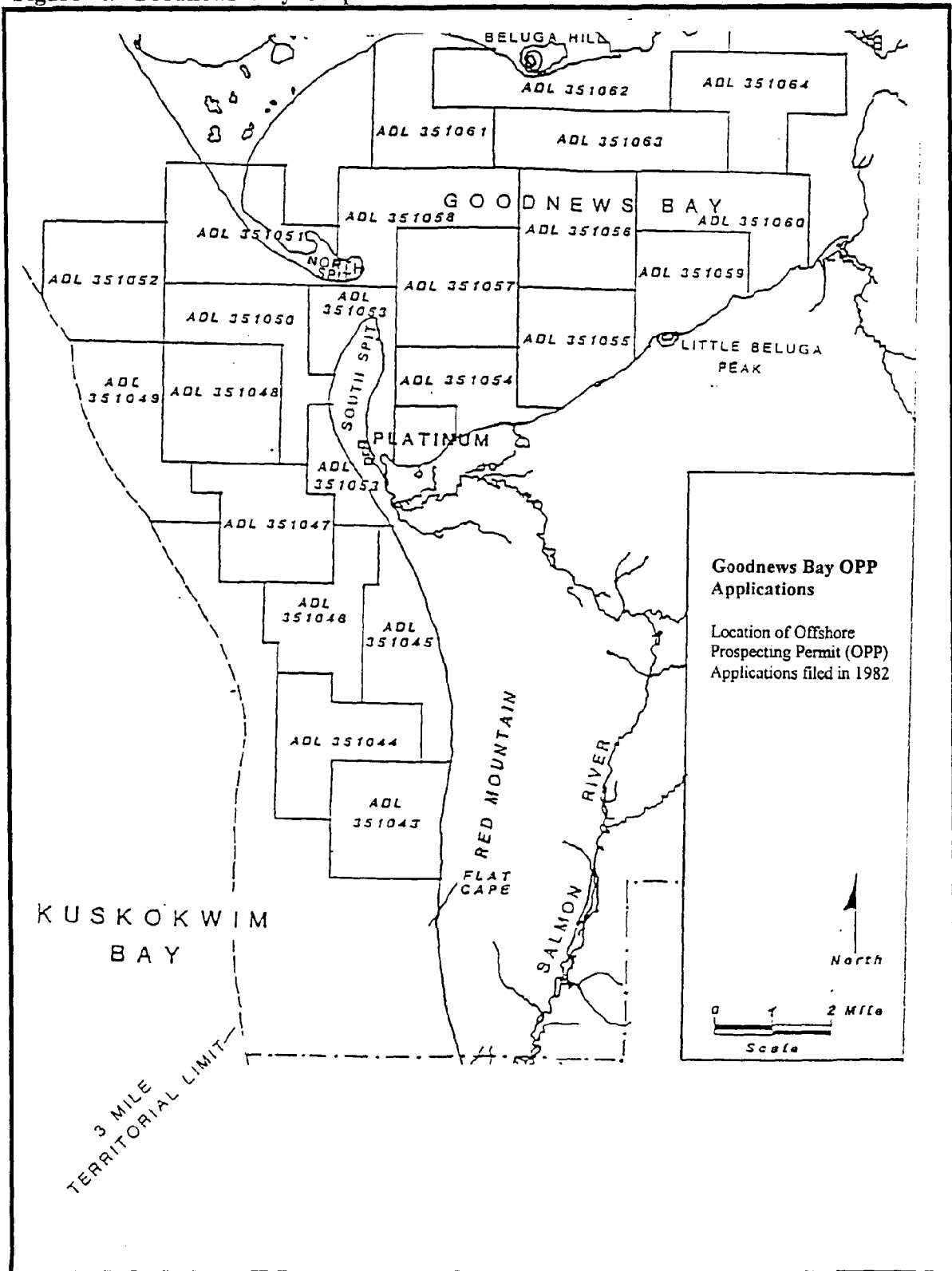
Coastal District and Local Community Concerns

By Fall 1988, Sheardown had completed a first draft of the Assessment Report and submitted it to DNR. DNR released it for public comment, sending it to the Cenaliulriit CRSA Coastal District (coastal district) and other government agencies. The Assessment Report cited thirteen enforceable policies from the CCMP that were applicable to the proposed mining exploration activities. The report did not provide an analysis of the consistency of the proposed prospecting activities with the CCMP and BBAP, explaining that this would be done as part of the "Best Interest and Consistency Determination processes." Addressing subsistence issues, the report concluded:

In terms of the total subsistence harvest, the sensitive species are found within Goodnews Bay. Outside of Goodnews Bay, there are no adverse salmon impacts and commercial fishing impacts are not a concern either. Whether inside or outside of the Bay, properly timed exploration activities are not likely to interfere with any subsistence harvests.

The coastal district expressed strong objections to this and other of the conclusions within the draft Assessment Report. The coastal district felt that the report did not contain adequate scientific information to address significant coastal district concerns about the potential impacts to subsistence resources and habitat coastal district residents need to "live and survive."

Figure 4. Goodnews Bay Map



In January 1989, Sheardown submitted a final Assessment Report to DNR, and DNR released it for public and agency comment. The report explained that a draft BIF and preliminary consistency determination would be prepared after DNR reviewed and considered written comments and testimony from informal public meetings. Again, the report identified thirteen policies from the CCMP applicable to the project, and explained that a detailed consistency analysis would be done as part of DNR's BIF and Coastal Consistency Determination (consistency determination).

In March 1989, DNR issued its preliminary BIF and proposed consistency determination report which stated that the project was consistent with the CCMP. The DNR report concluded that the State of Alaska proposed to open three tracts within Goodnews Bay and four tracts in Kuskokwim Bay to platinum exploration. The preliminary BIF contained an brief analysis of the exploration project's consistency with 57 policies within the CCMP. The report stated that actual mining activities would be analyzed for consistency with other applicable plan policies should platinum be found and a mining operation proposed.

*public
notification*

DNR published notices of the issuance of the preliminary BIF in three newspapers, sent notice to the postmasters and corporations of Goodnews Bay and Platinum, as well as the twelve village corporations and 48 individuals who had attended the public meetings. DNR also prepared a videotape in Yup'ik and English regarding their proposed action, and provided these to the District. The report explained that the preliminary BIF was completed to address only those issues associated with exploration and the issuance of OPPs. A second consistency determination would be required to actually mine the platinum if it is found as a result of the issuance of these OPPs.

In response to DNR's preliminary BIF and proposed consistency determination, the coastal district submitted a letter strongly disagreeing with the findings as they relate to subsistence. The coastal district found the project inconsistent with 114 policies in the CCMP that addressed the following CCMP issue areas: Toxics, Biological Activity, Habitat and Subsistence Resources and Uses, Turbidity, Disturbance of Ocean Floor, Fuel Spills, Currents and Circulation, Cultural Impacts, Mitigation Measures, and Cumulative Impacts. The letter opens with a summary of the coastal district concerns:

yes!

It is difficult to know where to begin, since all our concerns are related and cannot be discussed without overlap. However, rather than being seen as a problem, DNR should recognize this an important indication that all parts of the ecosystem and the Yupik way of life are related, to attempt to separate them, or affect a part without affecting the whole, is to deny the reality of the Yukon-Kuskokwim Delta.

In terms of the consistency with Cenaliulriit's coastal program, the overriding concern is the effect the proposed project will have on the environment, including habitat degradation, depletion of fish and wildlife, conflict with subsistence uses, and impacts on health and way of life.

Our plan openly states its bias toward the Yupik culture, recognizing that "the Yukon-Kuskokwim Delta is the Yupik homeland." (CCMP, p. 6-1). The plan has as one of its primary goals, in conformance with ANILCA's 801 subsistence provision, the preservation of the historical, traditional, cultural (and successful) fishing, hunting, gathering way of life of the Yupiks. (CCMP, p. 6-2). Indeed, the plan declares:

For the purpose of coastal management, the entire coastal zone is a subsistence zone as defined in Alaska Administrative Code Section 6 AAC 80.120;. Within

this subsistence zone, hunting and gathering have priority over all other uses of the land. However, this does not exclude or limit other uses. (CCMP, 6-11).

It should come as no surprise, then, that many of the mandatory standards of the plan focus directly or indirectly on the protection of subsistence resources and its uses; nor that the ways in which this project are inconsistent with our plan are essentially conflicts with subsistence and the fish, wildlife and habitat needed to sustain that way of life.

In addition to comments from the coastal district, DNR received detailed comments from the Kuitsarak, Inc. objecting to the preliminary BIF and proposed consistency determination. Kuitsarak, Inc. explained that "the proposed disposal is inconsistent with the CCMP at a number of points -- particularly when it comes to the issue of subsistence." Further, Kuitsarak explains that

although the Cenaliulriit Program doesn't prohibit offshore mining, it does require any government agency making a consistency determination to make sure that:

- (1) Possible adverse impacts of the action on subsistence use must be analyzed and safeguards provided to assure subsistence use.
- (2) The action will not curtail the age-old hunter-gatherer culture of the Yupik.
- (3) The action will not remove indispensable fish and game habitat from use by the age-old hunter-gatherer culture of the Yupik.
- (4) The project will not cause a decrease in the range or extent of diversity within the local ecology that the village depends on for food. (emphasis added).

Kuitsarak Inc. explains that the preliminary BIF and Assessment Report failed to analyze potential impacts of fuel spills or mercury poisoning on subsistence uses, much less provide safeguards to "assure" continued subsistence use. For the same reasons, the PBIF does not "make sure that the proposed action "will not" curtail Yupik culture, remove indispensable habitat, or cause a decrease in the range of diversity within the local ecology.

Kuitsarak further explains that the Cenaliulriit Program also requires stringent management of essential habitat such as Goodnews Bay. Among other things:

- (1) All essential habitat will be managed to maintain or enhance the biological, physical and chemical characteristics that contribute to the capacity to support life.
- (2) Essential offshore habitat will be managed as a fisheries conservation zone so as to maintain or enhance the state's sport, commercial, and subsistence fishery.
- (3) Essential estuary habitat will be managed to assure adequate water flow, nutrients, and oxygen levels and avoid adverse impacts on natural drainage patterns.

Kuitsarak, Inc. further explains that "far from managing this essential habitat to maintain or enhance its biological, physical, and chemical characteristics" the proposed disposal could very likely result in mercury poisoning, fuel spills and turbidity, any one of which could destroy the habitat. Kuitsarak Inc. acknowledges that the "CCMP does allow activities which do not conform to the Cenaliulriit habitat standards, but only if it is established that there is a significant public need and no feasible or prudent alternative exists to meet that

need." (CCMP) 6-25). Kuitsarak explains that the "PBIF simply doesn't establish such a need, much less determine that there is no alternative available to meet any such need."

In addition to comments from the Cenaliulriit CRSA coastal district and Kuitsarak Inc. objecting to the preliminary BIF and proposed consistency determination, DNR received twelve objection comments from the Alaska Resources Association, Goodnews Bay Traditional Village Council, Cenaliulriit-Bethel Yupiit Nation, Native Village of Kwinhagak, City of Goodnews Bay, Akiachak Native Community, Platinum Traditional Council, Platinum City Council, Nunam Kitlutsisti, Inc., Alaska River Safaris, Ltd., Inlet Fisheries, Inc., and Rural Alaska Resources Association. Eight of the objection comments were in the form of resolutions adopted by the village government, Native corporation or association. All of the objection letters and resolutions discussed the project's potential to harm important subsistence resources and habitat. Seven of the objection letters were sent to the DNR DOM, and five were sent to Governor Steve Cowper.

DNR also received letters from Alaska State Representative Lyman F. Hoffman and State Senator John Binkley stating their strong objections to issuance of the proposed OPP's. The letters explain that there is strong opposition to the project from communities they represent, and they were personally concerned about potential impacts to subsistence in the region. In 1989, legislation was introduced in the State Legislature that would establish the entire disposal area as "critical habitat," thereby closing it to mineral leasing (SB 318 and HB 332).

Goodnews Resources, Inc., WGM, Inc., and Karin Sheardown also submitted comments in response to the Assessment Report. Goodnews Resources, Inc. explained that they were interested in participating in the exploration project and expressed concerns about the possibility that OPP applications outside Goodnews Bay would be rejected. They felt that concerns about subsistence in Kuskokwim could be addressed through stipulations that addressed the timing of exploration rather than outright closure.

note 2. WGM, Inc. specifically objected to DNR's rejection of OPP applications in Goodnews Bay, and explained that exploration activities would not harm subsistence resources and habitat. Karin Sheardown's letter also objected to the rejection of OPPs in Goodnews Bay, arguing that many parts of the bay are not environmentally sensitive or important for subsistence habitat and resources.

Agency Comments

In response to the Fall 1988 issuance of the draft Resource Assessment Report, DNR received a memorandum from ADF&G suggesting over 100 changes to the report. ADF&G explained that the report failed to incorporate all the available information that is relevant for a state's best interest finding. The ADF&G memo explained that the report is deficient in:

1. The portrayal of fish and wildlife resources in the region and the potential for impacts from offshore mining to those resources.
2. The description of human uses of fish and wildlife resources and the values of those resources to the local and regional economy.
3. The assessment of potential impacts of offshore mining to fish and wildlife resources and human uses of fish and wildlife.
4. The assessment of alternatives to mitigate the impacts.

In response to the DNR's preliminary BIFs and proposed consistency determination, DNR received comment letters from the Alaska Department of Environmental Conservation (ADEC), Alaska Department of Fish and Game (ADF&G), and the Alaska Department of Law (ADOL). Both letters were received within the time frame established for consistency review comments. In its letter to DNR, ADEC explained that "in a hierarchical rating of relative resource importance, the (CCMP) clearly ranks renewable resource harvest first, followed by non-renewable resource development." As a result, ADEC expressed concerns about the impact of the proposed exploration and mining would have on water quality, and suggested additional stipulations for inclusion in the final BIF that address water quality issues, including a stipulation that requires water quality monitoring of all OPP application areas. The letter questions DNR's use of a consultant with an interest in the outcome of the permits to prepare the Assessment Report.

Don't!
✓

ADF&G's letter explained that it had actively participated in the review of the proposed preliminary PBIF and proposed consistency determination process. ADF&G supported DNR's decision to reject OPP applications within Goodnews Bay and other areas containing significant subsistence habitat and resources. However, the letter states that "there are still significant deficiencies in the proposed BIF which we strongly recommend (be corrected) before preparing the final BIF." One of these deficiencies was inadequate information important to addressing the coastal district's subsistence concerns:

The PBIF does not adequately portray subsistence use areas outside of Goodnews Bay. These deficiencies were identified in our December 15, 1988 comments on the draft Resource Assessment Report and published information depicting subsistence use areas was made available to the consultants preparing the Resource Assessment Report.

*Could DFGG
have as adequate?*

The department gathers geographic subsistence use information so that the state can consider those uses values and minimize impacts on subsistence resources and harvest areas. ADF&G subsistence research depends largely on the direct involvement and cooperation of local residents who participate, in part, because they understand that documenting their resource use areas will help maintain their opportunity to harvest fish and game and because the state uses the information to evaluate potential impacts to subsistence uses.

It was embarrassing that the subsistence use information which communities provided us six years ago was not included in the Resource Assessment Report. We are disappointed that all of the available information describing subsistence uses in the affected area has not been considered despite our repeated efforts to ensure that it was incorporated into the decision-making process.

The ADF&G letter further explained that the department supported DNR's decision to reject OPP applications in Goodnews Bay and certain areas outside the Bay. However, ADF&G stated additional areas also need to be deleted to protect important subsistence resources. The letter contains additional stipulations developed by ADF&G to protect subsistence resources and habitat. ADF&G concludes that "incorporation of our recommendations into the BIF and Consistency Determination are necessary to ensure that the best interests of the state are served and this disposal is consistent with the (Alaska Coastal Management Program)."

The ADOL letter explained that stipulations in the preliminary BIFs report should be limited to exploration activities, and *not* to actual mining operations. The department suggests that the report explain that additional stipulations may be applied at the time of lease operations. The ADOL also addresses a number of concerns related to the issuance of bonds.

Consistency Determination, Elevation and Appeals

In July 1990, DNR issued a proposed final BIF, and proposed final consistency determination. DNR suggested rejecting all applications within the Bay, within one-half mile of the sandbar and shoal, and within 500 feet from the Kuskokwim Bay coastline. This version contained 18 stipulations that attempted to meet the concerns of the coastal district, local community, Karin Sheardown and other interested parties. DNR re-wrote two sections of the Assessment Report in response to coastal district concerns that the report reflected the biases of one contractor who had staked claims in some of the subject lands.

July 13, 1990, the coastal district wrote a letter to DNR acknowledging receipt of the FBIF and the re-written Assessment Report and notifying DNR that the Coastal district had decided to "elevate" DNR's decision to the Commissioner level as provided under the coastal management program procedures. The elevation letter provided a brief summary of Cenaliulriit's reasons for the elevation, including district concerns about potential adverse impacts to subsistence resources and habitat. The primary reason for the elevation was potential adverse impacts on subsistence harvests and habitat. The comments stressed the extent to which coastal district residents depend on subsistence for food. The elevation letter also expressed concerns about the late date that the Coastal district received the PBIF and RAR, the adequacy of the proposed coastal buffer zone, the adequacy of the stipulations designed to address prospecting and eventual mining, and the lack of consideration of some of the objectives of the state's offshore mining program, the failure of the state to recognize the total costs associated with the long term impacts and displacement of local communities as a result of the mining operation.

The Commissioners decided on a one-quarter mile buffer zone, and deferred the issuance of the OPP's from one-quarter to one-half mile from shore pending further research. On August 10, 1990, in response to the Commissioners' decision, DNR issued its final Best Interest Finding (FBIF) and Coastal Consistency Determination, with 18 stipulations, and a discussion of how these stipulations respond to the standards at issue in the CCMP.

Seven days later, the coastal district appealed to the Alaska Coastal Policy Council (CPC), as provided by statute, which states that if the appellant's petition makes a "showing," then the CPC will hold a hearing. The CPC, pursuant to its "Guidelines for Processing Petitions Received by the Coastal Policy Council under AS 46.40.100" held a subcommittee hearing attended by DNR, Sheardown and the coastal district.

Based on advice in a September 28, 1990 Assistant Attorney General memorandum to the CPC subcommittee, the CPC used a "substantial evidence" test to determine whether DNR followed proper agency procedures or properly considered district policies. The CPC subcommittee decided that substantial evidence supported DNR's decision, and that the coastal district had failed to make the requisite showing.

Kuitsarak Corporation with 5 other Native governments corporations and organizations, including the Cenaliulriit Coastal District, filed an appeal of both the decisions of DNR and of the CPC to the Superior Court. The Court consolidated the appeals for adjudication.

On February 19, 1991, the Superior Court Judge issued a decision on the appeal in which he upheld DNR's Best Interest Finding, but sent the Coastal Consistency Determination back to the Council because the Judge had found that the Council had not used the correct legal standard in its showing hearing. The Judge ruled that the CPC erred in requiring the coastal district to make a "substantial evidence" showing when the district was only

*"legitimate
procedure"
review -
not addressing
real issues &
interests*

*"legal"
review*

required to make a "prima-facie" showing. The "prima facie" standard is a lower standard that puts less of a burden on the coastal district to prove the need for a formal administrative hearing.

In July 1991, a second showing hearing was held by the CPC. This time the correct legal standard was used and the CPC voted that a showing had been made, and the petition should go to a full Evidentiary Hearing, which required the appointment of a Hearing Officer (HO) for a formal administrative hearing.

Aggravated

On October 31, 1991, the HO issued a written decision which was adopted by the CPC concluding that the OPPs issued by DNR, with attached stipulations, were consistent with the enforceable standards of the Cenaliulriit CRSA Coastal Management Program and that DNR gave due deference to the comments and recommendations of the Cenaliulriit CRSA Coastal District.

This decision was appealed first to the Superior Court and then to the Alaska Supreme Court by Kuitsarak Corporation and six Native corporations, organizations and governments (including the coastal district).

On March 4, 1994, the Alaska Supreme Court issued a decision reversing the decision of the Superior Court and the Coastal Policy Council and remanded the case to DNR to conduct another Resource Assessment Report and "best interest" finding. The Supreme Court ruled that DNR had, by its own regulation, closed certain tracts of land and then incorrectly issued OPPs on these tracts. Additionally, DNR failed to require that the impacts of mining the area be studied and evaluated in making the "best interest" finding. The court agreed with Kuitsarak Corporation that DNR would not be able to prepare a second "best interest" finding to evaluate the impacts of mining after the OPPs were issued. The court ruled that the general discussion of mining in the Resource Assessment Report was not adequate for the purpose of determining whether or not development of resource in this area is or is not in the state's best interest. And finally, the Supreme Court ruled that DNR incorrectly allowed Sheardown to control the creation of the RAR. The court felt that writing of the report was not adequately overseen by DNR, especially given the fact that one of the contractors who prepared part of the report had a financial interest of its own in issuance of the OPP.

CASE ANALYSIS

The Goodnews Bay case involves issuance of DNR Offshore Prospecting Permits (OPP's) that would authorize the applicant (Karin Sheardown) to conduct mining exploration in Goodnews Bay and Kuskokwim Bay. Issues associated with review of this case include:

- Misunderstanding over the importance of subsistence and the extent of analysis necessary to address subsistence concerns
- Disagreement over applying the concept of "reasonable balance" to accommodate both mining and subsistence
- The propriety of allowing Sheardown to pay for a consultant to prepare the Resource Assessment Report
- The use local knowledge to determine impacts within important subsistence areas
- Disagreement over the application of "due deference" to the coastal district

It was clear early in the consistency review process that there was a misunderstanding between DNR and the Cenaliulriit coastal district over the importance of the Goodnews Bay area for subsistence activities. The concluding statement in the 1988 Resource Assessment indicates how DNR viewed subsistence impacts and believes its impacts may be addressed:

In terms of the total subsistence harvest, the sensitive species are found within Goodnews Bay. Outside of Goodnews Bay, there are no adverse salmon impacts and commercial fishing impacts are not a concern either. Whether inside or outside of the Bay, properly timed exploration activities are not likely to interfere with any subsistence harvests.

important to survival ✓
This early report conclusion indicated that DNR did not view mining as incompatible with subsistence (or commercial fishing) and they would focus on mitigating potential impacts by requiring "properly timed activities." The coastal district, however, explained in their comments to DNR that district residents depended on Goodnews Bay for "survival," and that the Assessment Report was taking subsistence issues too lightly. The coastal district explained that they would require a high level of analysis, a complete understanding of impacts, and that the district was going to be closely involved in the balancing of issues. The district explained that Goodnews Bay area was too important to accept the use of inexact words such as "may," "probably," "would," and "could" to draw conclusions about potential impacts to subsistence. The coastal district explained that they were going to be "strict" in the consistency review, and wanted almost absolute certainty that this project would not harm subsistence.

While the coastal district expressed concern about DNR's approach to subsistence concerns, the Cenaliulriit Coastal Management Plan (CCMP) itself may have signaled to DNR that mining was possible in Goodnews Bay with proper balancing of issues. The CCMP does not identify the Goodnews Bay as an Area Meriting Special Attention (AMSA) or other special designation that indicated its importance to subsistence. Instead, the plan is non-committal on the issue of an AMSA designation, indicating that Goodnews Bay may eventually be studied for a future AMSA designation. Moreover, the CCMP seems to anticipate future conflicts between subsistence and other uses (such as mining). The plan sets forth a process and criteria for "balancing" competing uses, and states that no uses will be excluded or limited in the coastal plan.

"balance"
The "balancing" issue became significant when DNR released the final Assessment Report, the preliminary BIF and proposed consistency determination in 1989. The preliminary findings explain that the CCMP encouraged a "balancing" of issues, and that DNR guidelines also required balancing local concerns with those of the state and nation as a whole. The preliminary findings explain that DNR had done its best to balance local concerns with the need for mining. In the preliminary BIF, DNR explained:

(The Cenaliulriit coastal plan) requires the concept of reasonable balance on the part of the agency making the preliminary BIF and coastal consistency review. (Accordingly) numerous tracts have been deleted and others will carry stipulations to mitigate adverse social, economic, habitat, and environmental impacts. Protection of the environment and Yupik lifestyle was a priority in determining which OPP tracts to issue and which OPP tracts not to issue. *(parenthetical text added for clarity).*

Coastal district comments on this and other parts of the preliminary BIF indicated that there was no room to balance or compromise on this mining issue. The coastal district criticized the preliminary BIF and proposed consistency determination, and commented in letters that this kind of project (no matter how limited) was simply incompatible with subsistence uses

and activities. The coastal district called for DNR to "reject" the proposal, and the Kuitsarak Corporation requested that the entire project be put on hold so that the legislature could consider designating the disposal area as critical habitat and withdrawing it from mineral leasing.

The issue of "balancing" raises questions that are important to the coastal consistency review process. Does a plan that contains the "reasonable balance" concept automatically require a coastal district to balance every development proposal? Are some projects simply too risky to balance? Who decides on the balance? In the Goodnews Bay case, the coastal district seemed to feel that the impacts associated with this project, regardless of its scale, were so great that the project could not co-exist with subsistence.

yes!

Contrary to the coastal district position, DNR, the CPC hearing officer, and the Superior Court Judge all agreed that the two competing uses could be balanced, and in fact, that the CCMP requires that they be balanced. As a result, each decision attempted to balance mining and subsistence activities. Interestingly, Ms. Sheardown, in her response to the preliminary BIF, agrees that mining and subsistence need to be balanced, but she also seems to agree with the district that eventually mining activities will destroy subsistence, and that this is the price of progress:

New technologies with their marvelous benefits bring with them a price. They compete with the old methods and eventually replace the outdated and inefficient. In the best situations we may find areas where diverse resources such as fish and minerals can be harvested without competing with each other, but most of the time we must compromise. Sometimes we need to make a hard decision and choose one important resource to the detriment of another very important resource.

In addition to disagreement over "balancing" issues, the coastal district expressed disagreement and confusion over DNR's administrative decision to split the project review into two parts. DNR had explained in the 1988 Assessment Report that it was appropriate to conduct a consistency review of exploration activities first, and then conduct a second consistency review of mining activities as part of the lease process. Comment on the preliminary BIF, the coastal district expressed concern that DNR's interpretations of its own guidelines was not correct, and that the agency would not have the authority to require the applicant to conduct two consistency reviews. As a result, the District strongly recommended that the consistency review for the exploration activities also include a review of mining activities. This issue emerged time and again throughout the consistency review process, and served to foster coastal district confusion over DNR's process and concern that important mining impacts would be overlooked.

The coastal district also disagreed with DNR's administrative decision to allow Sheardown to hire a consultant to prepare the Assessment Report. Commenting on the preliminary BIF, the coastal district expressed concerns that the consultant would remain objective in preparing the Resource Assessment. In response to these concerns, DNR rewrote sections of the Assessment Report. However, this issue was a source of coastal district confusion and suspicion throughout the consistency review process.

had
approach

Also at this preliminary BIF stage, the Alaska Department of Fish and Game (ADF&G) worked jointly with village Elders to prepare comments, maps, and other information to address important subsistence concerns. This information represented "local knowledge" that would help in identifying important subsistence areas and impacts. Commenting on the preliminary BIF, ADF&G expressed concern that some of this information was not used in the Assessment Report and the preliminary BIF. These ADF&G concerns added to

the suspicion that DNR's process was not considering coastal district concerns and local knowledge.

In July 1990, DNR issued a proposed final BIF, and proposed final consistency determination concluding that the Goodnews Bay project was consistent with the CCMP. In the final findings, DNR attempted to balance important resource issues, by rejecting *all* applications within the Bay, within one-half mile of the sandbar and shoal, and within 500 feet from the Kuskokwim Bay coastline. This version also contained 18 stipulations that attempted to meet the concerns of the coastal district. The final BIF explains:

"balance" approach

(The CCMP) requires that the agency making the consistency determination apply the concept of reasonable balance. The decision to make certain lands available for OPP's reflects a reasonable balance that considers both the state's best interests and local concerns. This balance is demonstrated by the decision to delete several tracts and by the stipulations imposed to mitigate potential adverse social, economic, habitat, and environmental impacts. Protection of the environment and Yupik lifestyle has been a major concern in determining which lands to make available for OPPs. Because of these concerns, no lands within Goodnews Bay will be made available and all pending applications will be rejected. Certain areas outside of Goodnews Bay will also be deleted.

However, the coastal district did not feel that this balance would protect their subsistence concerns. The coastal district elevated the decision to the directors, the commissioners, and then to the Coastal Policy Council. A primary concern of the district was that DNR did not give the coastal district due deference in making its decision to approve the Goodnews project. The coastal district explained that DNR should have set out the coastal district's findings, discuss why that finding was being rejected, and explain then why the agency was making a determination to the contrary despite the fact that they were to give the district due deference. The hearing officer rejected this argument and explained that DNR *did* give due deference to the coastal district for the following reasons:

- "due deference" criteria*
- 1) DNR provided the coastal district and other interested parties with ample notice and opportunity to comment at nearly every stage of the consistency review process.
 - 2) In response to comments received from the coastal district and other interested parties, DNR significantly limited the geographic area of the OPPs.
 - 3) DNR added 18 stipulations to address concerns of the coastal district and other parties. The stipulation impose additional requirements for any future exploration or mining activities.
 - 4) In making the ACMP consistency determination, DNR provided an itemized explanation of how the OPPs and attached stipulations responded to each policy raised in the Cenaliulriit CRSA CMP.

*not administrative errors
not substantive issues*

On March 4, 1994, the Alaska Supreme Court issued a decision reversing the decision of the Superior Court and the Coastal Policy Council and remanded the case to DNR to conduct another Resource Assessment Report and "best interest" finding. The decision of the court to reverse the decision was due to DNR's failure to correctly analyze the phasing of mining in Goodnews Bay, and other technical administrative errors. The court did not base the decision on errors associated with coastal plan policy analysis, the due deference or other consistency review details.

4.0 ANALYSIS

PURPOSE

The purpose of this chapter is to clearly identify the problems associated with subsistence in implementation of the ACMP. It draws from the four cases to identify common causes for the gap between district expectations and agency decisions that affect subsistence. It has two parts. The first describes the framework used to organize the analysis and comparisons. The second identifies and discusses the problems identified as generally significant through the case studies. Several major topics crosscut and link these problems, including different views about subsistence and the ACMP, cumulative impacts, local knowledge, and the difficulties of effectively involving rural coastal residents and districts in complex planning processes.

FRAMEWORK FOR ANALYSIS

The ACMP involves five major programmatic levels. These levels provide a framework for analyzing and comparing the four cases, as well as identifying problems and potential solutions. Figure 5 diagrams these levels and some of their relationships.

The first level includes the broad social and political context within which the ACMP operates. This includes the “big picture” of differing ideas, attitudes, values and interests that are important for making sense out of the ways that people view subsistence.

The second level includes the policy framework of statutes and regulations that govern the ACMP and other state plans and authorities. This includes AS 46.40, 6AAC 50, 6AAC 80 and 6AAC 85, among others. The ACMP subsistence standard (6AAC 80.120) and other policies that structure the district plans and the consistency review process are key elements at this level.

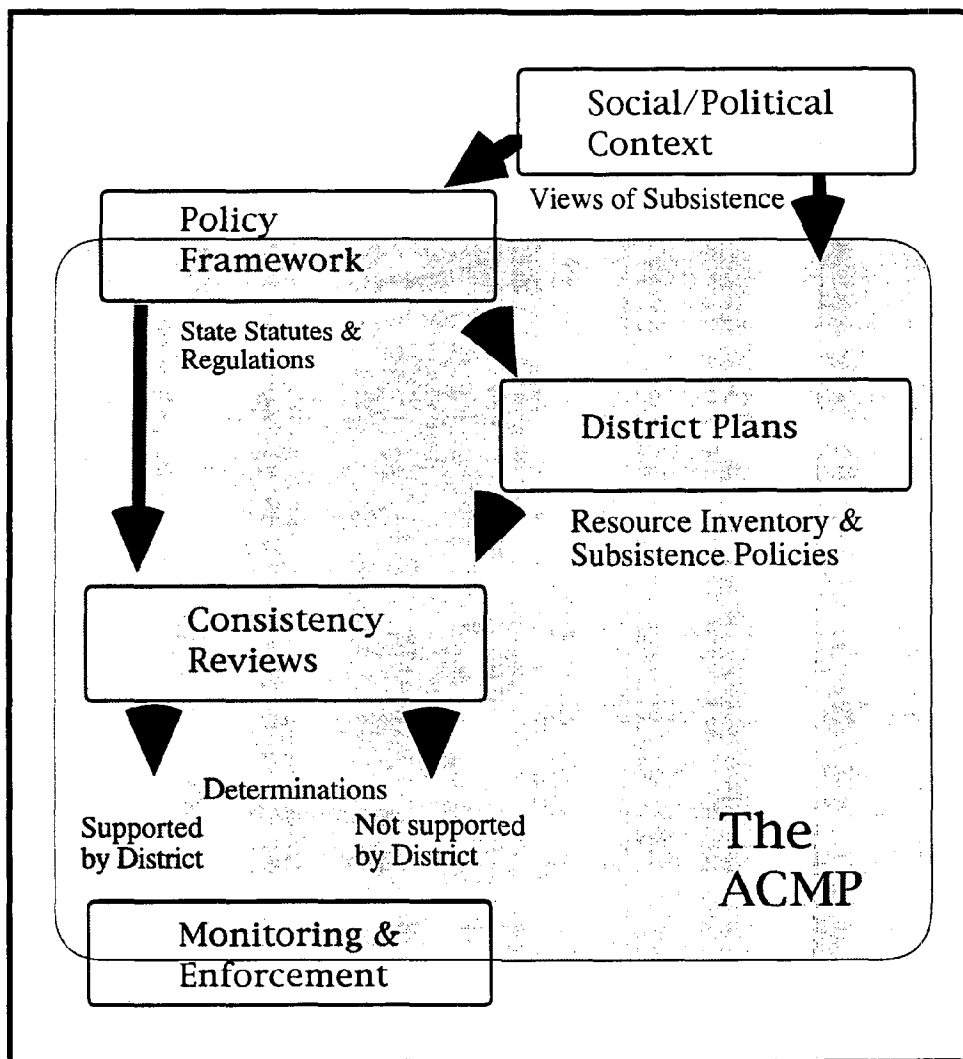
The next level includes the specific coastal district plans and programs. These include the elements common to each of these plans, including their Goals, Resource Inventory and Analysis, Special Areas, and Subsistence Policies. These plans are established and structured by the state policy framework.

The fourth level includes specific consistency reviews. This is the implementation phase of the ACMP -- the process through which specific projects are evaluated and approved, disapproved, or modified. Consistency reviews are structured both by the specific district plans, and by state policies laid out in the ACMP. The consistency review process results in specific decisions, which are viewed as either satisfactory or unsatisfactory from the district perspective.

A fifth level, which includes monitoring and enforcement of approved actions, is beyond the scope of this project.

Decisions and actions at each of these levels affected the outcomes of the four cases, and people’s perceptions of those outcomes. Different types of solutions are possible at each level as well. Therefore it is important to consider the role played by each of these levels in the case studies. They also provided a useful way to organize data analysis and interpretations of the cases.

Figure 5. Levels of Analysis.



PROBLEMS IDENTIFIED

This section describes and discusses problems with implementation of subsistence protections identified during the study. It identifies common issues and themes raised in the cases, and attempts to evaluate their relative significance. This is followed by a focused discussion of problems identified at each of the four levels outlined above. The findings in this section are summarized in Table 1.

These findings confirm that there is no single answer to the question that prompted the study:

Why does the State make permitting decisions that, in the opinion of the rural coastal districts, don't protect their subsistence activities?.

Instead, a number of problems intertwine to result in district (and agency) frustrations with the way that subsistence issues are dealt with. This section begins with a discussion of how different groups define and view subsistence and its significance. This sets the stage for detailed discussion of key elements of the underlying theme of differences in views of what subsistence is, and its significance.

SOCIAL AND POLITICAL CONTEXT

Different Views Of Subsistence

All district representatives said that differences in knowledge of subsistence and attitudes toward it were underlying problems in addressing subsistence uses through the ACMP. This issue was also referred to by agency staff, although they were not so unanimous about its significance.

One of the purposes of the projects was to contribute to better understanding of the issue by both district and agency staff. The purpose of this section is outline some of the differences between their views on subsistence, as background for discussing specific elements of the program. It is intended to contribute to better understanding of the different perspectives, rather than attempting to say that one is right or wrong.

approved?

The word "subsistence" has at least four distinct meanings in common use in Alaska. One deals with the activities of hunting, fishing, gathering, processing and sharing of wild resources, typically, but not exclusively by Alaska Natives. Another is a legal meaning, referring to the definitions and priorities for these uses established in state and federal law. Third is a more holistic meaning, used primarily by Alaska Natives to refer to their entire way of life, including not only subsistence "activities" in the sense used above, but the entire web of cultural, social and economic relationships that encompass them, including the connections between people, land and resources. The fourth refers to survival, or a minimum economic existence. This dictionary meaning is often referred to by urban residents when they oppose any recognition of subsistence as a legal priority -- "nobody in Alaska really relies on subsistence anymore".

Another important perspective on subsistence in rural coastal districts has been provided by social scientists. Most Native villages have what social scientists describe as "mixed" economies, in which small to moderate amounts of cash are earned, often seasonally. As the ADF&G Division of Subsistence has found in over 16 years of research, non-commercial hunting, fishing, and gathering by rural residents is a fundamental and important part of the rural Alaska economy. A typical economy in remote Alaska is a mixture of a variety of traditional pursuits and modern cash based pursuits.

The following sections describe some of the ways that subsistence is perceived and talked about by rural district staff and Alaska Native groups, and by agency staff and urban Alaskans.

Rural district views

The four rural coastal districts involved in the cases viewed subsistence as one of the most important issues addressed by their plans, and as one of the most important land uses in the region. For example, subsistence is the first issue identified in the Bering Straits Coastal Management Plan. It notes that

Subsistence is the principal land use and predominant way of life among residents of the Bering Straits region.

It goes on to identify two major goals related to this:

Goal A: Ensure the availability of access to subsistence resources and use areas for the continuation of subsistence as the predominant way of life for the region's people;
Goal B: Recognize subsistence as the primary land use of residents of the Bering Straits region (1986, Vol. 3, p. 2-1).

Similarly, the NANA Region CMP (1985, 1-6 & 7) states, under *Program Intent and Direction*:

The NANA Coastal Management Program is tied closely to the subsistence lifestyle of the Inupiat people and the resources on which they depend.... Subsistence hunting, fishing and foraging is a matter of survival to the people of the area. This strong relationship between the people of the region, and their environment, and the renewable land and sea resources provides the framework of this plan. (Emphasis added.)

Further, "it has been a regional policy to balance economic development with maintaining the traditional Native culture and subsistence economy." (p. 6-2.)

The Cenaliulriit plan takes a somewhat different approach. It notes that

The word subsistence is used as the title of this section because it is a familiar term.... However, subsistence as legally defined by the state of Alaska, is not the primary concerns of this section. Rather, it is the hunter-gatherer culture.... (1985, 6-10.)

It goes on:

✓ | people often confuse traditional Yupik hunting and gathering with what the state calls subsistence. Subsistence is a mainstream American concept that denotes a conscious decision to take up the lifestyle of living off the land as an alternative to buying groceries. The Yupik do not choose the hunter-gatherer culture; they are born into it. It is an all-encompassing system of values, beliefs, and actions. It is the framework within which the Yupik live. Although hunting and gathering are highly visible aspects of the culture, they are only part of larger pattern of behavior, a cultural pattern that is passed on from generation to generation. (Ibid. 6-10.)

When Alaska Natives speak of subsistence, they often do so in the context of this complete picture of their way of life, including social and cultural values and practices, economic practices, including hunting, fishing and other subsistence activities, and connections between people, land and resources.

While coastal district staff understand the legal rationale for defining subsistence in terms of rural residency for purpose of the state and federal subsistence statutes, they tend to view subsistence activities in the holistic meaning identified above, and to view it as an Alaska Native characteristic. Most of them probably agree with the Alaska Native Commission's finding that

The most fundamental reason why subsistence is such a difficult issue in contemporary Alaskan politics is that it is really about Alaska Natives and their cultures. (1994, Final Report Vol. 2, p 57.)

Rural coastal residents also view subsistence in the context of their perception of steady encroachment upon the lands and resources they use by people from outside the region. This involves both increasing consumptive uses -- particularly commercial uses by sport hunting and fishing guides, but also by individual sport hunters and fishermen -- and non consumptive users -- river rafters, hikers, etc.

The Alaska Native Commission concluded that a variety of social and health problems in rural Alaska are the result of historic changes brought about by contact with Western society. It notes that family and kinship systems that governed everyday life, including delineations of relationships, responsibilities and rights of community members, were drastically wounded or destroyed.

Today, what is seen in village Alaska is the tattered remains of the traditional social and cultural complex overlaid with a jumble of confusing, marginally accepted Western social, governmental, educational and legal structures. (p. 63.)

Alaska Native see themselves as losing control of important parts of their lives. This is a key element in their perspective of the dispute over management of fish and game, which has been of major concern to residents of all four of the districts involved in this study. It has also affected their views of offshore oil and gas development. Rural coastal communities see this as a major threat to livelihood and way of life over which they have little influence. The Exxon Valdez oil spill in 1989 intensified these concerns. Rural residents are also concerned about their loss of political influence in the legislature, and potential cuts to programs important to rural Alaska.

In the rural districts the ACMP is viewed as an additional tool for reducing impacts on local communities and their subsistence activities. A recent study suggests that subsistence zoning is a mechanism that has much in common with traditional conservation measures in these areas, which emphasized control of access to hunting and fishing areas (Erlach and Magdanz 1994).

A recent analysis of the social and economic well-being of Alaska Natives (Alaska Native Commission, 1994) seems to succinctly summarize Alaska Native perspectives on subsistence:

The subsistence issue in Alaska, regardless of the terminologies and concepts in which the issue has been couched for political reasons, is an Alaska Native issue affecting, principally, Alaska Natives and is the foundation of Alaska Native cultures - a foundation without which these ancient cultures would cease to exist;

Subsistence is an economic necessity in the absence of which many Native families would become totally dependent on government handouts for survival;

The vast majority of village residents choose to practice subsistence, regardless of the accessibility of cash incomes; and,

Subsistence hunting and fishing remain under concerted political assault by powerful, organized interests which compete with villages for the limited public resources that governments must allocate to the extent that state and federal laws and policies at times serve to criminalize the very act of feeding one's family and one's spirit. (p. 58.)

For the foreseeable future, Alaska Natives will remain a permanent minority in a state dominated by the political and economic power of a non-Native, urban majority. Demographic pressures and political competition for natural resources will continue and increase. The fight over subsistence comes in cycles of legislative, regulatory and judicial activity. (p. 40.)

... the larger fact is that the interests and attitudes of non-subsistence user groups pervade the executive branch, the Legislature, the state courts and the Boards of Fisheries and Game. (p. 40.)

It summarizes these concerns by stating:

...the issue of Alaska Native subsistence remains unsettled. And so long as it remains unsettled, Native people will continue to live precariously in a legal no-man's land, stuck between federal vacillation and State of Alaska hostility to their subsistence way of life. (Vol. 1, p. 59.)

Urban and agency views

Like rural Alaskans and Alaska Natives, agency staffs' views of subsistence are shaped by the broader social and political systems they are part of, as well as by personal experiences and observations. Since few of them have lived in rural Alaska communities, their information about subsistence and rural Alaska tends to come from media, from relatively limited personal experiences, or stories and experiences of friends in these areas, and from professional contacts. The ways of life and subsistence activities are generally quite distant from their daily lives.

In contrast to the views of Native peoples noted above, in Western society land is typically viewed as a commodity. Land is bought and sold like any other commodity. A related concept is the Western idea of economic growth and increase. Land should be worked for the profit it can yield. Historically an owner who did not profit from their property was seen as not deserving to hold it.

✓ | A related Western cultural concept is that of progress. Economic and social change is viewed in terms of a progression from simpler to more complex forms for example. From this perspective, Alaska Natives, and the subsistence way of life are seen as in an inexorable shift away from a hunting and gathering way of life, toward the Western mainstream. From this perspective subsistence is an anachronism, an increasingly ineffective holdover from previous times that will inevitably disappear, absorbed by the modern world and market economy. This leads to the view that efforts to protect subsistence through government policy are a welfare measure, intended to soften the blow of inevitable social, economic, and environmental change. This view appears to be quite common among agency staff. This has important ramifications for the way that they interpret the requirements of the subsistence standard, and the policies in district plans, as allowing for gradually moving subsistence uses aside as what they see as more important uses come along and displace them.

This is also rationalized by the common view that people in rural Alaska aren't really very different from those in urban areas. This view says that most people have a choice today of where to live and how to live -- while there are minor differences in economic situation between urban and rural areas that is really no justification for different treatment.

Many urban residents see customary and traditional uses of fish and game as attributes of individuals, such as a lifestyle preference, habit, or personal heritage. This leads to the idea that subsistence uses can be identified by individual characteristics such as age, monetary income or ethnic status (Wolfe and Ellanna, 1983). This is closely tied to the modern liberal perspective, that the individual is the primary social unit and political measure. From this perspective if there is any "need" for subsistence privileges they should be based on individual situations, rather than those of groups or communities. Related to this are laymen's often over-generalized interpretations of laws dealing with equal protection, and appeals to the popular idea of "equal hunting and fishing rights."

Agency staff also operate within the context of particular agency cultures. DNR in particular has been through a series of shifts over the past 15 years in respect to policies regarding the use and disposal of state lands in rural areas. Until the early 1980's DNR policy appears to have separate policies for rural Alaska, and areas closer to major population centers. However, this shifted in the mid 1980's, due to increasing pressures to put state land into the hands of individuals. Rainery (1984, p. 59), reports that DNR explicitly shifted to the view that "state land and resources are a matter of statewide interest and concern. Local concerns are important but they must be balanced with conflicting statewide concerns." Many of the major DNR area plans were developed during this period.

State policies, and agency staff, tend not to recognize subsistence as a land use comparable to others such as mining, logging, agriculture, etc. In contrast with rural districts, from the agency perspective subsistence tends to be overlooked as a land use. It tends to be seen as a residual category -- what is left over after other uses occur, or as a subset of a broader classification of "fish and wildlife use." The history of land use planning efforts in rural Alaska reflects a tension between these divergent views about subsistence. Subsistence uses are so extensive that they seem to become a background to other more intensive uses of land and resources. Since most agency staffs' experience with hunting and fishing activities are in the context of recreational uses, it is not surprising that their interpretations and ideas about subsistence would be colored by these experiences.

To the extent that agency staff do recognize and acknowledge subsistence uses as highly important in rural Alaska they see them as one use to be balanced against others.

balance

Permitting agency staff typically reflect a preference for the value of neutral scientific analysis and management. They tend to see science as impartial, compared with data and claims that might be tainted by political interest. They also see science as successful. They believe that decisions should be based primarily on scientific data, because it is most strongly verified, and that the best scientific data is "hard" science. From this perspective biological data is more valued than sociological data, for example.

Another example of the role of agency culture involves different ideas about the importance of different types of impacts. Agency staff tend to focus on the importance of direct biological impacts, or impacts on habitat, viewing habitat loss as of greater significance than issues of displacement or competition. For example, in reference to the Timber Creek case, some agency staff noted that there had been surprisingly little local concern about mining operations on Seward Peninsula, which in their mind had more serious consequences for subsistence resources than did trapping cabins.

In contrast to its ideas about land as individual, rather than communal property, American society sees fish and wildlife as belonging to residents in common. As noted above, the issue of competition for fish and wildlife, and its impacts on local coastal communities, has been narrowly framed by agency interpretation as an "allocation" issue that is out of bounds for the ACMP program. Again, agency culture and political pressures play a role in these interpretations. As has been pointed out, ADFG has probably provided less assistance to the coastal districts on subsistence than it could have, due to the politics of the issue.

"allocation"
DSW

Some agency staff and the Alaska Department of Law have serious reservations about the use of coastal district plans to try to influence what they view as fish and wildlife "allocation" issues. It appears that the subsistence standard has not been used effectively by either local districts or agencies to strengthen the case for protection of important fish and wildlife habitat due to these agency concerns about these "allocation" implications.

Part of the reason for this interpretation seems to be the high profile and controversy over state subsistence management in the 1980's and early 1990's, and to avoid having the coastal districts drawn into this issue. For example, ADF&G staff explicitly said that they avoided addressing the subsistence standard. ADF&G's Habitat Division, which at times has the lead on ACMP responses, tends to focus on habitat standards, and to defer to local district on other aspects of the subsistence standard. Agency staff stressed that they stick to the habitat standard. Supervisors "would not let us get into the allocation squabbles." Their view is that the local district has to do the work to show that the subsistence standard is relevant in a particular issue.

In summary, differences in views about subsistence seem closely related to differences in situation and context. Coastal district staff living in places where it is centrally important to most residents see subsistence as highly important. The districts they work for have placed it as one of the most important land and resource uses that they are charged to protect. Agency staff, on the other hand, not only tend to live in places where subsistence is unimportant, but where it is highly controversial. The agencies they work for are balancing a variety of mandates.

YES!
Institutional
Structures &
Cultures ✓

The problem is not so much how individuals view subsistence, although this can contribute to difficulty in communication between rural district staff and individual agency staff. The more significant question has to do with the way that the institutions structure the relationships, and structure attitudes -- which views and behaviors do they support and reward, and which attitudes and behaviors do they discourage? In the context of the ACMP, the emphasis of agency staff is on verifiable, documented, preferably scientifically supported data. It is also on a narrowly defined legal and technical definition of subsistence. And it occurs within the context of balancing competing interests in land and resources, in which agency staff often see themselves as representing "statewide" interests, against the parochial and narrower concerns of local residents.

Difficulties In Communicating About Subsistence Issues

In addition to the problems raised by the attitudinal and policy differences noted at the beginning of this section, there is also high potential for misunderstanding due to cultural differences in ways of viewing and talking about the natural world.

Districts also expressed concern about their ability to justify their position on the impacts of coastal development, or sometimes more important, counter an agency analysis of development impacts. While coastal coordinators may be able to effectively use plan policies to regulate coastal activities, there are very few resources at their immediate

disposal to counter sophisticated (but sometimes incorrect) agency analysis of development impacts. Coastal coordinators often rely on discussions with village elders, hunters, and fishermen to gain information on the impacts of proposed development in subsistence areas. This information is not easily translated into a sophisticated technical analysis of impacts that is preferred by agency decision-makers. Agency interpretations of plan policies are often backed up by scientific data from resource agencies, legal opinions from legal departments, and experts from consultant firms.

no tech.
tools for
analysis
✓ use + local
playing field

This problem is clearly evident in the Timber Creek and Goodnews Bay cases where local hunters, elders and other village residents were asked to testify about subsistence uses and about their knowledge of local environmental conditions in support of district positions. In important instances, these district residents were unable to articulate their concerns in a way that was technically useful to the hearing officer or judge. They would up feeling that their points were ignored by the agency, Hearing Officer, or judge. On the other hand, agency staff commented that it seemed that many of these types of comments were off point.

Coastal coordinators from BSCRSA and Cenaliulriit recognized that state agency staff are sometimes frustrated in working with Native villages.

A number of observers have commented on the difficulties experienced in merely translating terms that relate to nature, and to land management, between Alaska Native languages and English. "The opportunity for misunderstandings when dealing with complex land management issues is very real." (Gallagher, 1992, p. 147.)

Basic assumptions about these relationships between Alaska Natives and resource managers can be directly opposed. For example, the Yup'ik put considerable emphasis on the power of words in the relationship between people and wild resources.

Pete (1991: 3) writes that from the Yup'ik perspective:

Undue attention to resources in trouble hastens their downturn and eventual demise.... Wild resources are known to make themselves scarce to remind humans of their equal footing with them, especially when humans make inordinate commotion over wild resources. When resources face difficult times, it is considered more appropriate to deliberate and act on what human behavior and interaction should be changed to improve the situation.

Hensel's analysis of a specific exchange between resource managers concerned about low returns of salmon, and Yup'ik fishermen concerned about proposed closures of the fishery exemplifies these differences: "The non-natives keep saying 'there are no fish', and the Yupiit keep saying 'Don't say that there are no fish.' Everyone is confused. Presumably the non-Natives wonder why the Yupiit are undercutting the effectiveness of the presentation. The Yupiit wonder how grown men can be so careless with their speech, and so willing to publicly declare themselves (and everyone else) to be morally bankrupt." (1992, p. 250). Other examples of these types of relationships are discussed in Morrow and Hensel (1992).

It should not be surprising therefore that rural coastal district plans, as well as comments on specific proposals, might be lacking in specific details about the likely impacts on resources. While "local knowledge" might reflect general local belief that the projects create risks for resources, Yup'ik speakers at least are very unlikely to speak specifically about lack of resources, since in their view such a lack may be caused by careless speech, or may be an evidence of poor character.

power of
words

This view of the power of words, and of the moral significance of relationships between people and wildlife differs drastically from the dominant framework of Western resource managers, where the underlying image is that of a biological system affected directly by people's harvests, rather than their words and ideas.

These types of situations often result in different groups talking past each other. While this topic cannot be fully developed here, it obviously has implications for the way that local knowledge is treated in consistency reviews.

Divergent Views About "Balancing" Subsistence and Other Uses

The ACMP, from one perspective, appears to be working as it was intended. All of the cases examined were relatively straightforward procedurally. There were few significant problems with the processes used, even though two of the cases went to higher courts. From an agency perspective the program successfully balances competing interests and uses of coastal resources. DNR's findings concerning the Goodnews case exemplify this perspective:

[The district plan] requires the concept of reasonable balance on the part of the agency.... [In DNR's attempt to balance subsistence and mining] numerous tracts have been deleted and others will carry stipulations to mitigate adverse social, economic, habitat, and environmental impacts. Protection of the environment and Yupik lifestyle was a priority in determining which OPP tracts to issue and which OPP tracts not to issue. (Brackets indicate added language.)

However, from Cenaliurliit's perspective the subsistence values of Goodnews Bay were so important, and the local benefits from the proposed development so insignificant, that it was difficult to understand why there was serious consideration of the dredging proposal. Agency actions were incomprehensible to them.

Many of the enforceable policies in rural coastal district plans have been written to provide decision-makers with flexibility. For instance, many of the subsistence policies identified in the Timber Creek case call for the protection of important subsistence habitat and harvest areas, but also provide room for other uses and activities once impacts are identified and appropriate mitigation is established. Coastal districts generally support policies that flexibly allow balancing important subsistence values with other economic development opportunities.

However, districts are concerned about the narrow reading of subsistence policies by state agencies that may be technically correct, but are viewed by the district as inconsistent with the central theme of the plan. The Bering Straits CRSA CMP, for example, contains considerable plan text that discusses the importance of subsistence to the community and the need to protect important fishing and hunting habitat to support subsistence activities. District staff felt strongly that this central theme should be considered when state agencies are uncertain about the correct interpretation and implementation of plan policies. Moreover, they felt that in the Timber Creek case state agencies ignored important plan text that could have helped determine the District's intent in drafting enforceable policies. The districts suggest that using plan text to interpret the meaning of plan policies and considering central themes within the plan would be more effective in interpreting plan policies than the narrow analysis used by state agencies.

In the four cases examined, three eventually had satisfactory outcomes from the district perspective. At the consistency review stage, however, only one of them (Kotzebue 58) was fully satisfactory. The others were resolved through appeals, or in the case of

Winkelman, through program changes that did not affect the outcome of the specific case. Although data is lacking, this may actually be broadly representative of coastal consistency determinations. In several key cases, however, rural coastal districts felt that their subsistence concerns were not adequately dealt with in the ACMP.

POLICY FRAMEWORK

Several problems related to the overall policy framework of state laws and regulations are identified in the four case studies. These include problems with the ACMP as well as with its relation to other state programs.

A. The ACMP subsistence standard is poorly understood and infrequently used by rural coastal districts or agencies.

Rural coastal districts make little specific use of the ACMP subsistence standard and are uncertain about its meaning and strength. Agency staff have provided little encouragement, assistance or guidance in using the standard. This uncertainty and hesitance to use the standard seem to have a variety of causes, including uncertainty about the conditions under which non-subsistence uses can be prohibited, which of these uses come under the purview of the ACMP, and whether it covers cumulative and indirect impacts, as well as concern about whether this approach is appropriate to the realities of subsistence land use in rural areas, or effective in protecting them.

The ACMP subsistence standard provides for the designation and protection of areas where subsistence is the highest priority. It reads:

6 AAC 80.120. SUBSISTENCE. (a) Districts and state agencies shall recognize and assure opportunities for subsistence usage of coastal areas and resources.

(b) Districts shall identify areas in which subsistence is the dominant use of coastal resources.

(c) District may, after consultation with appropriate state agencies, Native corporations, and any other persons or groups, designate areas identified under (b) of this section as subsistence zones in which subsistence uses and activities have priority over all non subsistence uses and activities.

(d) Before a potentially conflicting use or activity may be authorized within areas designated under (c) of this section, a study of the possible adverse impacts of the proposed potentially conflicting use or activity upon subsistence usage must be conducted and appropriate safeguards to assure subsistence usage must be provided.

(e) Districts sharing migratory fish and game resources must submit compatible plans for habitat management. (Eff. 7/18/78, Register 67)

The program also specifically authorizes the designation of "areas which merit special attention", or AMSAs, for the purposes of protecting "areas important for subsistence hunting, fishing, food gathering, and foraging;" (6 AAC 80.158 (1)).

The major question here involves lack of clarity about the conditions under which non-subsistence uses can be prohibited. Section (c) provides that coastal districts may identify subsistence zones in which subsistence uses "have priority". Section (d) requires a study of the impacts of potentially conflicting uses, and appropriate safeguards for subsistence. However it fails to address what happens when no appropriate safeguards exist -- and whether the conflicting use should then be prohibited. Nor does this section make it clear that cumulative impacts to subsistence should be considered.

Despite these uncertainties a few districts have prohibited conflicting uses within certain zones, though without referencing Section. 120. Both the NANA coastal district plan and BBCRSA coastal plans have policies that prohibit land uses that conflict with subsistence uses in certain areas. This is accomplished in the NANA plan through prohibition policies tied to specific subsistence zones (IRUA's and SUA's). In the BBCRSA this was a side effect of the designation in the AMSA plan (which is also part of the state area plan) of areas for "primitive" land uses within which many land uses are prohibited or limited to

protect the existing character of the areas. The ACMP subsistence standard was not used as the basis for these land use designations.

Others have not specifically attempted to apply the subsistence standard even though subsistence uses are critical to the district, such as in the Cenaliulriit CRSA.

In interviews coastal district staff indicate that although there is interest in prohibiting uses that conflict with subsistence in key areas, they are not certain if this is possible under the subsistence standard. It is not clear to what extent this problem arises from the standard itself or from the way that agencies have interpreted and influenced districts in addressing subsistence protections through plan development and permit reviews.

6 AAC 80.120 sets up a procedure for addressing certain aspects of protection for subsistence. While it states that districts may identify areas in which subsistence has a priority over other uses, it does not clearly give authority to prohibit conflicting uses or activity. In fact, by requiring an impact analysis and development of mitigation measures, it implies that direct prohibitions will seldom if ever be used.

Another issue involves the silence of the ACMP subsistence standard about which conflicting uses and activities it covers, and the way this has been construed over time. The differences between cases involving direct impacts to resources, and those involving impacts to subsistence uses have been noted throughout this report. In the two cases that deal with issues of competition over resources or potential displacement of subsistence uses by other uses (Timber Creek and Winkelman), district staff indicate that they had been discouraged from using the ACMP subsistence standard to address these types of issues.

*direct vs.
indirect
impacts
by whom?*

The breadth of the terms used in the ACMP subsistence standard -- "subsistence uses and activities have priority over all non subsistence uses and activities", could be interpreted to allow comment on projects where the impact is increased competition for coastal resources or displacement of traditional uses. This interpretation is supported by the rulings of the CPC and the Superior Court in the Timber Creek case. Even though they ruled against the BSCRSA, they put considerable effort into examining the question of such indirect effects.

*causation
indirect
effects ok!*

The ACMP subsistence standard is also silent about which conflicting uses and activities it covers. The differences between cases involving direct impacts to resources used for subsistence, and those involving impacts to subsistence uses have been noted throughout this report. Direct impacts -- those that would directly reduce fish or wildlife populations used for subsistence, or their habitat -- are unproblematic. Indirect impacts are those where the project or proposed use would reduce existing opportunities or ability to harvest resources for subsistence, by causing displacement, increased competition, or restricting legal or physical access. Cumulative impacts to subsistence uses refers to the combined effects of several projects on subsistence harvest opportunities, either direct or indirect.

*"indirect
impacts"*

In the two cases where potential competition for resources or potential displacement of subsistence uses by another use are the issue (Timber Creek and Winkelman), district staff indicate that they have generally been discouraged from using the ACMP subsistence standard to address these types of issues. It is unclear whether the subsistence standard allows or requires evaluation of indirect or cumulative impacts during consistency reviews.

The breadth of the terms used in the ACMP subsistence standard -- "subsistence uses and activities have priority over all non subsistence uses and activities," could be interpreted to allow comment on projects where the impact is increased competition for coastal resources or displacement of traditional uses. This interpretation is supported by the rulings of the

*broader
interpretation
possible*

CPC and the Superior Court in the Timber Creek case. Even though they ruled against the BSCRSA, they put considerable effort into examining the question of such indirect effects.

B. The relationship between the ACMP and resource agency's independent planning and permitting authorities is unclear, and contributes to confusion, disagreement, and conflict between districts and agencies over the way that subsistence is treated in the ACMP.

On paper the relationships between consistency determinations and resource agency independent permitting authority is relatively straightforward. During either consistency determinations or state area plan development, guidelines and policies should be consistent with one another. During consistency reviews stipulations placed on a permit are based only on ACMP policies. Stipulations or concerns that have been brought up during consistency reviews that are related to state agencies' other authorities or plan documents are noted on the final consistency determination as "advisories" to advise the applicant that while these are not ACMP concerns, these issues exist. However, confusion or disagreement over this was a significant issue in three of the four cases examined (Timber Creek, Goodnews Bay, and Winkelman).

Confusion!

Moreover, the recent Superior Court decision in the Timber Creek case has created further confusion about this relationship. It stated that the provisions of a DNR Area Plan can be used by a coastal district either as policies against which the project could be reviewed for ACMP consistency or to support its interpretation of its coastal management plan. This decision is now under appeal to the Alaska Supreme Court. This issue goes beyond subsistence concerns.

A basic question in the Timber Creek trapping cabin permit review was whether the provisions of the DNR Northwest Area Plan (NWAP) could be used by the coastal district to either establish policies against which the project could be reviewed for ACMP consistency or to support its interpretation of its coastal management plan. The NWAP provided clear language that "trapping cabin construction permits should not be issued if the cabin will conflict with existing trapping and subsistence activities". The district relied on this to argue that the proposal was not only inconsistent with the NWAP, but also to support its argument that the project was inconsistent with its coastal management plan.

DNR, however, found the trapping cabin permit request consistent with the NWAP management guidelines. At the Director level elevation, the Directors agreed with the coastal district, and found the cabin proposal inconsistent, relying on the NWAP. Neither the regional or Director level decision addressed ACMP policies. The Commissioners reversed this, focusing strictly on coastal district plan policies. The CPC Hearing Officer agreed with the Commissioners and affirmed that it was beyond the authority of the CPC (ACMP) to assess the compatibility of the project with NWAP policies. However, the Superior Court reversed this part of the ruling, saying that the coastal district was correct in measuring project compatibility with the guidelines of the NWAP.

This Superior Court ruling has further confused this issue. It implies that the coastal districts and the state agencies are correct in using state area plan management guidelines as ACMP policies. This has serious implications for the relationship between ACMP and DNR authorities. This decision is now under appeal to the Alaska Supreme Court.

In both the Winkelman and Goodnews Bay cases the coastal districts' consistency review focused in part on the concerns about the DNR adjudicatory process for its own permits and authorities (trapping cabin and offshore prospecting permit issuance). Review of the case files reveals that particularly in the Goodnews Bay case, both coastal districts and state

agencies were confused about how to handle these concerns as part of the consistency review.

The Winkelman trapping cabin permit review by the Bristol Bay CRSA provides a contrast with these two cases. It shows how a coastal district can get its subsistence related concerns more effectively addressed when it has worked closely with state agencies during Area Plan or AMSA plan development.

limited relationships!

C. Policies that encourage new settlement or new uses of land or resources in rural areas are often perceived as a threat to subsistence uses and community well-being by residents of rural coastal districts.

Two of the cases examined (Timber Creek and Winkelman) involve conflict between local resident's views of how subsistence should be protected, and state policies that give exclusive use of land (by lease or purchase) to one party (such as trapping cabin permits).

People in rural Alaska are concerned at a "gut" level about the removal of land from communal use. They see the transfer of land into private hands, and the development of private claims to land and resources as one of the greatest threats to their long term well being. Rural residents and Alaska Native leaders have stressed that traditional land uses by the residents of remote Alaska must be preserved.

The concept of private ownership of land and resources is in exact opposition to traditional land use principles in Western and Northern Alaska. In traditional Alaska Native societies in these areas the right to use and occupy land is determined by membership in a local group. Land and people were considered to be inextricably linked -- land is held in common for the benefit of people of the group, and the characteristics of the land define its people. Local social and cultural controls have traditionally determined who has access to particular lands and resources (Wolfe, 1993). In the view of residents of these areas, these traditional land uses should be considered and given a priority.

State land disposal policies (trapping cabin program, etc.) are broadly viewed in rural communities as in basic conflict with local districts' interests in maintaining subsistence opportunities. They are seen as benefiting non-local residents, and bringing them into villagers' backyards.

A major report for the legislature in the mid 1980's described the problems associated with the impacts of state land disposal policies on subsistence in considerable detail (Rainery, 1984). The ADFG Division of Subsistence has also conducted extensive studies which illustrate the impacts on subsistence uses by local communities of improved access and of land disposal policies (Wolfe and Walker, 1987).

Negotiations over the use of state lands in Bristol Bay, in both the BBCRSA CMP, and the Nushagak-Mulchatna Plan show that local residents did not want remote lands to be disposed of or developed, and that they preferred clustering of land disposals near existing communities.

Similarly, the Cenaliurrit CMP emphasizes that local residents prefer that rates and locations of population change not be disrupted by outside influence or policies, and that they desire orderly change to minimize intrusion. Policy (3.1) in the Cenaliurrit CMP requires that measures be taken to "minimize disruptive cultural contact when a proposed action will attract a substantial number of non-Yupik to a traditional Yupik village." It suggested that this would be 5% of the population of the village.

This view is supported by the tendency for Alaska Native corporations to lease rather than sell lands for resource based economic development. This is based on an explicit recognition that leases can be designed to protect a variety of local social and cultural values, and that over the long run subsistence may be the main land use of many areas.

✓ This is related to a broader concern identified in the ACMP Assessment. Coastal districts generally view the program as drifting away from what they see as a basic purpose -- giving local communities greater control over land and water use in their immediate area (draft ACMP Assessment report, August 30, 1996).

In two of the cases examined there seems to be a fundamental conflict between state land disposal policies or permits that give exclusive use to an individual (such as the trapping cabin permits) and subsistence. These concerns are evident in both the Timber Creek and the Winkelman case, and in other cases mentioned by districts but not investigated in this project.

COASTAL MANAGEMENT PLANS

A. Some rural coastal district plans do not adequately document specific subsistence resources, uses, or use areas that are of concern.

All four coastal district plans studied did a good job of generally describing the importance of subsistence to residents of the coastal district. They all had fairly strong sections outlining general background about subsistence. However, some of them were not as strong as they could have been.

B. Some rural coastal district plans lack subsistence zone designations.

Some plans did not identify areas important for subsistence, or subsistence zones. For example the Cenaliurrit plan did not identify the waters of Goodnews Bay as a subsistence zone, or provide specific policies for its protection. Similarly the Bering Straits CMP was not clear about the boundaries of Special Use Areas.

Some of the plans treat subsistence in such broad and holistic terms that it is difficult to translate them into action. The Cenaliurrit plan, for example, takes a very sweeping view of subsistence, stating that "For the purpose of coastal management, the entire coastal zone is a subsistence zone..." (CCMP, p. 6-11). The BSCMP is more specific in designating areas important for subsistence, and policies, but lacks specific policies concerning the issue of land settlement policy. The NWAB CMP is much more specific, and the BB CMP most specific of all, with its AMSA plan for the Nushagak-Mulchatna River area.

C. Some rural coastal district plans fail to specifically identify local concerns about subsistence uses or to include strong policies for addressing them.

Several of the coastal plans involved in these cases did not contain clear and predictable policy direction for the regulation of specific uses of particular concern. In the effort to strike a balance between the environment and development they do not follow through from broad goal statements to provide strong direction about how uses likely to conflict with subsistence should be treated. They either did not prohibit the proposed use, or did not identify the areas where the project was proposed as important for subsistence, or did not have clear policies for protecting subsistence.

Similarly the Bering Straits CMP did not specifically address trapping cabins and did not spell out its relationship to DNR's Northwest Area Plan.

The Timber Creek case provides a natural experiment in applying two different sets of subsistence related policies to a single situation, with two different outcomes. In contrast to the Bering Straits CMP, which had little specific information relating to trapping cabins, or the impacts of land disposals on subsistence, the NWAP had clear strong language that addressed local residents' concerns and discouraged permanent shelters because they were not the traditional pattern for trapping in the region. The NWAP provided the Directors with justification for upholding the district's position, while the BSCMP was used by the Commissioners to reverse it. This indicates that stronger language in the BSCMP might have provided an outcome satisfactory to the district.

The problem of overly general policies in district plans is particularly significant for the issues of competition for resources, potential displacement of existing uses, and indirect or cumulative impacts. Direct impacts on fish and wildlife are typically more clearly addressed and strongly supported in coastal district plans.

*indirect vs.
direct impact*

THE CONSISTENCY REVIEW PROCESS

Coastal district staff frequently note their frustration that subsistence uses are not given equal weight with other types of resource and land uses during consistency reviews. They are also frustrated because it seems that for every review they have to reaffirm and defend the importance of subsistence to their region, despite the clear priority that it receives in district plans. They believe that agencies need to take more responsibility for ensuring that subsistence values are protected. On the other hand, districts do not use existing subsistence policies and information as effectively as they could. This section identifies problems and potential solutions that address both of these issues.

A. Coastal district subsistence policies are not always used effectively.

In two of the cases (Kotzebue 58 and Timber Creek) neither the coastal districts or the agencies completely or systematically applied district subsistence policies during the consistency determination. This weakened the district's comments in both cases, and contributed to the complexity of the Timber Creek appeals.

In the Kotzebue 58 case, the district, while listing a number of applicable policies, omitted one of the strongest policies dealing with the Escholtz Bay Special Use Area in their comments during the consistency review. Neither the USFWS or ADF&G referenced subsistence policies in their comments about impacts to subsistence resources.

There has been an ongoing dispute about the respective responsibilities for addressing coastal district policies. In October 1997 the Coastal Policy Council approved a recommendation that says that "It is the primary responsibility of the districts, not state agencies, to raise the applicability of a specific district enforceable policy during the consistency review process."

*district's
responsibility*

It is difficult to see how districts and agencies can carry out their charge under the ACMP subsistence standard to "recognize and assure opportunities for subsistence usage of coastal

*agency
responsibility*

areas and resources," if agencies have no responsibility for referring to district enforceable policies.

B. Assessments of impacts to subsistence in consistency reviews are sometimes incomplete, superficial, or poorly documented. Cumulative impacts and indirect impacts are sometimes poorly addressed.

The four case studies and interviews revealed that information about subsistence uses and treatment of impacts to subsistence uses in consistency reviews in rural coastal districts are sometimes inadequate.

Information about subsistence uses in rural coastal districts is often weak at the level of detail required for assessing impacts of specific projects. Existing scientific information that could support coastal district's subsistence related concerns is also sometimes not effectively brought into the consistency review. In the cases examined, none of the coastal districts used scientific data to support their comments about impacts on subsistence. In the Kotzebue 58 case, both a state and federal agency brought scientific information about impacts to subsistence resources to bear on the consistency review, providing significant support for the local district's position. Similarly, in the Goodnews case, ADF&G information about impacts to fisheries played a key role in persuading DNR to modify the size and location of the project.

ADF&G's Division of Subsistence, which is a potential source of support for rural districts, has never had staff or funds to provide significant assistance to the rural coastal districts. Upon request they provide existing data, including maps, reports and survey results, to the districts or to consultants working on district plans. The Division of Subsistence is seldom contacted for its input or views during consistency reviews.

A related problem is that cumulative impacts to subsistence sometimes are not adequately considered. The cumulative impacts of increasing pressures on subsistence uses from new land uses were inadequately addressed in several of the consistency reviews. In all four cases the rural districts had underlying concerns about changes that could reduce existing subsistence options. While sometimes difficult to reconcile with the projected impacts of a specific case, this is essentially a concern about incremental impacts and cumulative impacts to subsistence opportunities.

Issues of cumulative and secondary impacts have recently been the subject of several major investigations for DGC (Gray 1993; Dames & Moore 1995; HDR Engineering 1995; Walkinshaw 1994). Many of the issues they raise are clearly related to rural coastal districts' concerns about the impacts of projects on fish and wildlife habitat and populations, and of increasing competition on subsistence hunting and fishing by local residents. These reports also reveal the complexity and difficulty of systematically assessing cumulative and secondary impacts.

Some of the evidence that state land disposals could impact subsistence opportunities is discussed in Rainery (1984, esp. 72-104). He notes that the "two major areas of conflict between current land and resource users and potential users brought into remote areas on the heels of State land offerings will be competition for fish and wildlife resources and the reduction of fish and wildlife habitat." (p. 96.) As noted elsewhere it is easier to demonstrate potential effects of habitat loss or direct impacts to fish and wildlife than for competition.

Greater use of local knowledge is an obvious potential solution to some of these problems. Local residents are extremely knowledgeable about local environmental conditions and subsistence use patterns. However, local knowledge is often ineffectively used during consistency reviews. Sometimes local knowledge is referred to in an ad hoc way during the project permit review stage, instead of being based on materials built solidly into district plans or documented in a systematic way. This makes it more likely that local knowledge will be dismissed as biased and politically motivated in disputes over competing land uses.

Sometimes districts had trouble communicating their concerns about subsistence impacts to agencies. They had difficulty in tying local knowledge about subsistence uses and impacts directly to district policies and the project that's being reviewed in ways that permittees can understand and incorporate into the consistency determination.

"in ways that permittees can understand"

In several of the cases consistency reviews and comments about impacts to subsistence were relatively superficial. In some cases districts pointed out concerns with little supporting documentation. This was the case in the Goodnews Bay, Timber Creek, and Winkelman cases, where the district initially listed general concerns about impacts. As these cases moved forward the district identified more specific issues, and drew specifically on local knowledge about environmental factors and subsistence uses. However this made it look as if the district was raising new issues to justify its position, potentially weakening its credibility with the reviewing agency. It seems clear that local knowledge was disregarded or downplayed during permit reviews in the Timber Creek case because it was not directly tied to district policies/plans and because it was viewed as biased or politically motivated.

In the Kotzebue 58 case, by contrast, concerns about direct impacts on both resources and subsistence hunting (e.g. chasing marine mammals away) are clearly articulated up front in comments about proposal. However, in this case too, local knowledge was not brought to bear as strongly as it might have been if more background information had been presented.

This was a greater problem in addressing district concerns about competition for resources than it was in cases of direct impacts to fish and wildlife. The district comments on Kotzebue 58, focusing on direct impacts to marine mammals, fish, birds, etc. were more compelling than the vaguer concerns expressed in the Timber Creek case about the impacts of cabins and increased competition for resources.

A related problem is lack of trust of agencies by local people. They are reluctant to share information about their subsistence uses out of concern that information will be used against local people.

TRUST !

C. Rural coastal districts and permitting agencies are unclear about what weight local knowledge should, or does, carry in consistency reviews compared with scientific data or best professional judgment.

In some cases it appears that agencies gave limited consideration to local knowledge compared to their treatment of scientific data or best professional judgment. This was evident in the initial stage of the Goodnews Bay case, where the district only very vaguely pointed out concerns about impacts, with little support. Later the district wound up identifying much more specific issues, and drawing specifically on local knowledge about currents and other environmental factors.

The Timber Creek case also provides a useful test case for the role of local knowledge. The Hearing Officer in the case decided to hear the case de novo. This provided the district

and local communities with the chance to come back with new information about their concerns. They provided considerable discussion of local knowledge, as shown in the hearing transcript. This ranged from information about how local residents use subsistence resources generally, to their uses of the specific drainage and area of the proposal, as well as their fears and concerns about the impacts of the project. The record of the Timber Creek case indicates that neither the Hearing Officer or the Superior Court judge were hearing the subsistence concerns of local residents and the district. As discussed above, this happens for a variety of reasons. Agency staff and others from outside the coastal district have difficulty understanding the information conveyed by residents, which often seems like opinions or stories to them. To local residents and coastal district staff it appears that non-natives are not listening to their concerns, or do not trust them.

In the Kotzebue 58 case concerns about direct impacts on both resources and subsistence hunting (e.g. chasing marine mammals away) are clearly articulated up front in comments about proposal.

Again, this was more of a problem in addressing district concerns about competition for resources than it was in cases of direct impacts to fish and wildlife. The district comments on Kotzebue 58, focusing on direct impacts to marine mammals, fish, birds, etc. were viewed as more compelling than the vaguer concerns expressed in the Timber Creek case about the impacts of cabins and increased competition for resources.

D. Some districts believe that agency definitions of impacts to subsistence are too narrow and restrictive and therefore miss "big picture" district goals of protecting subsistence as a way of life.

"technically correct"
Despite general support for use of flexible policies, districts are concerned about the narrow reading of subsistence policies by state agencies that may be technically correct, but are viewed by the district as inconsistent with the central theme of the plan. For example the Bering Straits district pointed out that their CMP contains considerable plan text that discusses the importance of subsistence to the community and the need to protect important fishing and hunting habitat to support subsistence activities. They felt strongly that this central theme should be considered when state agencies are uncertain about the correct interpretation and implementation of plan policies. Moreover, they felt that state agencies ignore important plan text that can help to determine the district's intent in drafting enforceable policies. The districts suggest that using plan text to interpret the meaning of plan policies and considering central themes within the plan would be more effective in interpreting plan policies than the narrow analysis used by state agencies.

The holistic view of subsistence noted above may result in differences in ideas about how subsistence should be represented for planning purposes. This is revealed in a quote from the original Cenaliulriit plan:

The Cenaliulriit Coastal Management Program does not attempt to identify specific hunting or gathering sites. Two things prevent identification: First, there are too many sites to list, and second, the sites change from time to time as game migrates and river courses change. Euro-Americans raised in an urban-industrial culture that places great emphasis on real estate often have difficulty dealing with this lack of positive identification. But the concept of a hunting-gathering "site" is meaningless in the Yupik hunter-gatherer society. To the hunter-gatherer, the ecosystem is indivisible and land cannot be owned. (p. 6-11.)

The Cenaliulriit plan also specifically states that it does "not attempt to identify specific hunting or gathering sites." In several cases districts were concerned about providing specific data about subsistence sites and uses. This is a considerably different view from that held by agencies, who want to have specific data and policies that are area specific.

In the Timber Creek case, for example, the district objected to the effort to dissect the issue into tiny pieces. They felt that impacts to subsistence should be considered in the broader context of their plan's goals and intent to protect the subsistence way of life.

E. Elevations and court appeals tend to divert attention from basic concerns, are time-consuming and costly, and seldom resolve basic issues of concern to either coastal districts or agencies.

One of the problems of elevations and court appeals is that neither party to such cases tends to find the outcome particularly satisfactory. Even when one party gains part of what it wants from the appeal, it is likely to lose something else of value. In addition specific rulings seldom help improve any party's position over the long run, or help improve the broader ACMP program. Both the Goodnews Bay case and the Timber Creek case illustrate these problems.

*was the best
outcome*
|| ✓

As noted in the case analysis for Timber Creek the BSCRSA is pleased with the part of the Superior Court's ruling that clarifies that it can use the NAWP to interpret and support the district's position. However, other parts of the ruling limited due deference to the district to the consistency review, which is much less favorable to the coastal district.

Additionally the Superior Court ruling led in a very different direction from that which has been built over time for the ACMP. While it has been long been considered appropriate for ACMP and State Area Plans to work together and set out policy direction consistent with one another, the ACMP has always sought to keep the two separate. The Court's ruling blurs this distinction.

*unintended
results*

Again, while the outcome of the Goodnews Bay case was favorable from the coastal district's perspective, the ruling had little to do with the consistency of the project with the district plan. It dealt with an issue that is important for the broader issue of how the impacts of projects are assessed, and whether a project can be looked at in stages. However, this is essentially a procedural point with little lasting significance for the Cenaliulriit district program. The main effect of the appeal was to delay the project, a desirable outcome from the district perspective, but one that may not assist the district in dealing with future proposals for offshore mining.

F. Rural coastal communities sometimes fail to respond to consistency reviews in a timely or effective manner because they have difficulty in getting information out to potentially affected villages about projects that may affect subsistence, and in getting information back from them about their concerns.

Although this issue was not identified as specifically significant in any of the cases that we examined, it was mentioned as a significant issue during interviews with rural coastal district staff. It was also part of the reason that several communities requested additional hearings during consistency reviews in some of the cases.

- more time needed
- inappropriate process

obstacles

10 extra
days!

District staff felt that the ability of rural residents to respond to consistency reviews is hampered by the short time frames for getting information about the project out to potentially affected rural communities, and then getting comments back from them. They argue that the public notice system just doesn't work in these areas. Among the problems they cited were the limited number of people with appropriate background and time in most rural villages, language barriers, unfamiliarity with ACMP and other governmental procedures, and the logistical problems of transportation and communication in rural areas. These combine to make it difficult for coastal coordinators to feel comfortable that local residents understand the implications of projects, that their subsistence and other concerns are being addressed, and that their views are adequately conveyed back to the agencies.

Ten extra days are presently allowed for comments in some districts for this purpose, but this is viewed by district staff as inadequate for getting meaningful local comment. In addition DGC currently has a policy of stopping the process if a local meeting or hearing is planned that relates to an issue under consideration in the consistency review. This is intended to allow more complete information gathering.

The Bristol Bay CRSA has tried to provide short summaries -- one page descriptions of projects and key issues, but has found that even with this assistance it is often difficult for local people to identify specific subsistence concerns.

SUMMARY

"striking a
balance"

"due deference"

The ACMP is founded on the idea of identifying important land uses, and then striking a balance between competing interests. From the perspective of rural districts, a major problem with the program is that it is too successful at this. Some of them feel that the central importance of subsistence means that the usual approach of balance should not apply. The larger polity, and its agency representatives, have such different life experiences, and so little understanding and sympathy for subsistence, that they cannot fairly balance subsistence values against others. Therefore, these districts conclude, they must be in the position to evaluate when and to what extent a balance is appropriate. They think that this is the point of due deference.

This difference in perspectives on the broad importance of subsistence, and on who should decide the balance, seems to underlie much of the dissatisfaction with the ACMP by rural districts. This is exacerbated by communication differences. Specifically however, a series of problems with implementation of the program have been identified in this study. These include the failure to incorporate specific subsistence standards in district plans, as well as difficulties in having subsistence impacts fully considered in consistency reviews.

The ACMP has experienced some successes in ensuring that subsistence concerns are adequately addressed in consistency determinations. They seem to have been most successful in cases where districts have worked out clear policies for protecting subsistence in their plans and when they have carried out consistency reviews that specifically reference these policies, convey specific local knowledge about uses and resources of concern, and have backup from science and/or the best professional judgment of agency staff. Another successful strategy has been to develop long-term professional relationships with agency staff, so that the district can build on successful resolutions of issues over time. These potential solutions are discussed in the following Chapter.

5.0 POTENTIAL SOLUTIONS

Chapter Four focused on clearly identifying the problems that underlie the way subsistence is dealt with in the ACMP. This chapter focuses on identifying potential solutions to these problems. It is organized by the four programmatic levels identified in Chapter Four -- social and political context, policy framework, coastal district plans, and the consistency review process. Each section begins by briefly restating the problems identified above. The potential solutions were developed in collaboration with the RCDI Task Force, although not all members agreed with all of the suggestions, or gave them the same priority.

Issues related to the broader social and political context underlie many of the other problems identified, and are therefore summarized first. However straightforward solutions are not as readily available for these problems compared to issues at the three other levels related more directly to the ACMP. Most of the solutions identified below do not require statutory or regulatory changes. Most either require improvements to existing procedures, more technical support to rural coastal districts, or more information and training for state agency and coastal district staff. ✓

1. SOCIAL AND POLITICAL CONTEXT

As discussed at length in Chapter Four, implementation of the ACMP in rural areas is significantly affected by interrelated problems that derive from underlying social and cultural differences. These include views of subsistence, ways of communicating about it, and ideas about the appropriate balance between subsistence and other uses. ✓

Divergent Views Of Subsistence

Differences in views about subsistence are closely related to differences in situation and context. Rural coastal district staff live in places where subsistence activities and land uses are centrally important to most residents. The citizens they represent place it as one of the most important land and resource uses that they are charged to protect. Agency permitting staff, by contrast, tend to live in urban areas where subsistence is not as important and is often highly controversial. This physical and social distance is further compounded by the fact that the agencies they work for are balancing a variety of mandates.

Alaska Natives tend to view subsistence in the context of the Native way of life, including cultural values, economic practices (including hunting, fishing and other subsistence activities), and connections between people, land and resources. It is jeopardized by steady encroachment upon the lands and resources used for subsistence by people from outside the region. This includes projects that threaten wildlife habitat, as well as increasing consumptive and non-consumptive uses of fish, wildlife and land. Rural coastal district residents see this as representing loss of control over their lives and resources.

Agency staffs' views of subsistence are also shaped by broader social systems, as well as by personal experiences and observations. Since few of them have lived in rural Alaska their information about subsistence tends to come from media, from limited personal experiences, or stories of friends in these areas, and from professional contacts. Rural ways of life and subsistence activities are generally quite distant from their daily lives.

Difficulties In Communicating About Subsistence Issues.

In addition to the problems created by attitudinal and policy differences noted above, there is also high potential for misunderstanding due to cultural differences in ways of viewing and talking about the natural world. Different groups wind up talking past each other.

Conflicting Ideas About "Balancing" Subsistence and Other Uses

Many enforceable policies in district plans are written to provide flexibility and discretion. Many of the subsistence policies identified in the Timber Creek case, for example, call for the protection of important subsistence habitat and harvest areas, but also provide room for other uses and activities once impacts are identified and appropriate mitigation is established. Districts appear to support policies that are flexible and require balancing important subsistence values with other economic development opportunities. Despite general support for flexibility, districts are concerned about what they see as narrow reading of subsistence policies by state agencies that may be technically correct, but which the district sees as inconsistent with the central theme of their coastal management plans.

*institutional
culture*

While individuals' different views of subsistence contributes to difficulty in communication between rural district staff and individual agency staff, the more significant question has to do with the way that the institutions structure relationships -- which views and behaviors do the institutions support and reward, and which attitudes and behaviors are discouraged? In the context of the ACMP, agencies emphasize verifiable, documented, scientifically-supported data. They also favor a narrowly defined legal/technical definition of subsistence. Further, decisions are made in the context of balancing competing interests in land and resources, where agency staff view their job as representing "statewide" interests, against the parochial and narrower concerns of local residents.

Rural coastal district staff on the other hand, are caught between agency expectations, the legal and technical requirements of the ACMP, and the expectations and realities of village life. They are constantly trying to broker between these different worlds, with little hope of satisfying either side.

The widespread nature of these differences means there are no easy or straightforward solutions. Like other broad social, cultural, or values issues they are not amenable to simple answers. However, many of the solutions to the specific programmatic problems identified below could also help address and solve these broader problems. Options for reducing the problems caused by these differences are discussed in more detail in the rest of this chapter.

2. POLICY FRAMEWORK

Several problems related to the overall policy framework of state laws and regulations are identified in the four case studies. These include problems with the ACMP as well as with its relation to other state programs.

Problem 2A. The ACMP subsistence standard is poorly understood and infrequently used by rural coastal districts or agencies.

The ACMP subsistence standard provides for the designation and protection of areas where subsistence is the highest priority. It states:

6 AAC 80.120. SUBSISTENCE. (a) Districts and state agencies shall recognize and assure opportunities for subsistence usage of coastal areas and resources.

(b) Districts shall identify areas in which subsistence is the dominant use of coastal resources.

(c) District may, after consultation with appropriate state agencies, Native corporations, and any other persons or groups, designate areas identified under (b) of this section as subsistence zones in which subsistence uses and activities have priority over all non subsistence uses and activities.

(d) Before a potentially conflicting use or activity may be authorized within areas designated under (c) of this section, a study of the possible adverse impacts of the proposed potentially conflicting use or activity upon subsistence usage must be conducted and appropriate safeguards to assure subsistence usage must be provided.

(e) Districts sharing migratory fish and game resources must submit compatible plans for habitat management. (Eff. 7/18/78, Register 67)

The program also authorizes the designation of "areas which merit special attention", or AMSAs, for the purposes of protecting "areas important for subsistence hunting, fishing, food gathering, and foraging" (6 AAC 80.158 (1)).

However these regulations are unclear about the conditions under which non-subsistence uses can be prohibited. Section (c) provides that coastal districts may identify subsistence zones in which subsistence uses "have priority." Section (d) requires a study of the impacts of potentially conflicting uses, and requires appropriate safeguards for subsistence. This fails to address what happens when no appropriate safeguards exist -- and whether the conflicting use should then be prohibited. While these regulations state that districts may identify areas in which subsistence has a priority over other uses, they do not give clear authority to prohibit conflicting uses or activities. In fact, the requirement to analyze impacts and develop mitigation measures implies that prohibitions will seldom be used.

*internal
conflict of
ACMP*

In interviews and during the RCDI Task Force review, it was clear that rural coastal districts have concerns about the use of subsistence zones. In fact the whole concept may be significantly flawed. First, districts want to continue to have flexibility in balancing competing uses. The subsistence zone approach reduces this flexibility. Second, the realities of subsistence land use are difficult to translate into fixed lines on a map or on the ground. The fish and wildlife used for subsistence move and vary in distribution and abundance over time, and subsistence use patterns shift in response to these environmental conditions, as well as for other social and economic reasons. Additionally, different areas are important to different groups of people. These raise the problem of what criteria should be used for defining areas as "most important" for subsistence. Emphasizing one area as important implies that other areas not so identified are not as important, yet they may be extremely important at particular times, under particular conditions, or to particular people. These variables are difficult to pin down or to map.

Despite these uncertainties and lack of clarity, the ACMP and rural coastal districts have prohibited conflicting uses within certain zones. Others have not specifically attempted this even though subsistence uses are critical, such as in the Cenaliulriit CRSA.

The NANA coastal district plan has policies that prohibit land uses that conflict with subsistence use in certain areas. This is accomplished through prohibition policies tied to specific areas (Important Resource Use Areas's and Special Use Area's). In the Bristol Bay CRSA the designation in the AMSA plan (which is also part of the state area plan) of

areas for semi-primitive or primitive land uses has had a similar effect of prohibiting some uses that could conflict with subsistence.

Interviews with coastal district staff indicate that some are interested in prohibiting uses that conflict with subsistence in key areas, but are not certain if this is possible under the subsistence standard. Since some coastal districts have policies that do this, clarification is needed for both districts and agencies that this can be done, and guidelines should be developed to show how to do it correctly. It is not clear to what extent this problem arises from the standard itself or from the way that agencies have interpreted and influenced districts in addressing subsistence protections through plan development and permit reviews.

The ACMP subsistence standard is also silent about which conflicting uses and activities it covers. The differences between cases involving direct impacts to resources used for subsistence, and those involving impacts to subsistence uses have been noted throughout this report. Direct impacts -- those that directly reduce fish or wildlife populations used for subsistence, or their habitat -- can clearly be addressed by the ACMP. Indirect impacts are those where the project or proposed use would reduce existing opportunities or ability to harvest resources for subsistence, by causing displacement, increased competition, or restricting legal or physical access. Cumulative impacts to subsistence use refers to the combined effects of several projects on subsistence harvest opportunities, either direct or indirect. Coastal district staff indicate that they have sometimes been discouraged by agency staff from using subsistence policies to address indirect and cumulative impacts to subsistence. However, the breadth of the terms used in the ACMP subsistence standard -- "subsistence uses and activities have priority over all non subsistence uses and activities," seem to cover increased competition for coastal resources or displacement of traditional uses. This interpretation is supported by the rulings of the CPC and the Superior Court in the Timber Creek case. Even though they ruled against the Bering Straits CRSA, they put considerable effort into examining the question of such indirect effects. It should be clarified then that the subsistence standard allows and even requires evaluation of indirect or cumulative impacts in consistency reviews.

Solution 2A-1.

Clarify how the subsistence standard can be used in coastal district plans and policy development. This could be done through preparation of guidelines outlining how the standard is to be applied and interpreted, for example in the Assessment Guidebook.

This should clarify that conflicting uses include uses that cause indirect impacts to subsistence uses and cumulative impacts. It should also clarify that conflicting uses can be prohibited under specified conditions.

Problem 2B. The relationship between the ACMP and resource agency's independent planning and permitting authorities is unclear, and contributes to confusion, disagreement, and conflict between districts and agencies over the way that subsistence is treated.

On paper the relationship between consistency determinations and resource agencies' independent permitting authority is relatively straightforward. During either consistency determinations or state area plan development, guidelines and policies should be consistent with one another. During consistency reviews stipulations placed on a permit are based only on ACMP policies. Stipulations or concerns brought up during consistency reviews

that are related to non - ACMP authorities or plan documents are noted on the final consistency determination as "advisories" to advise the applicant that while the matter is not an ACMP concern, the issue exists.

However, confusion or disagreement over these relationships was a significant issue in three of the four cases examined (Timber Creek, Goodnews Bay, and Winkelman). Interviews indicated that it is a more general problem as well. Moreover, the recent Superior Court decision in the Timber Creek case creates further confusion. It states that the provisions of a DNR Area Plan can be used by a coastal district either as policies against which a project can be reviewed for ACMP consistency or to support the coastal district's interpretation of its coastal management plan. (This decision is now under appeal to the Alaska Supreme Court). This issue goes beyond subsistence concerns.

The Bering Straits CRSA relied on language in the Northwest Area Plan (NWAP) to argue that the Timber Creek trapping cabin proposal was not only inconsistent with subsistence protections in the NWAP, but also to support its argument that the project was inconsistent with subsistence protections in its coastal management plan. DNR, however, found the trapping cabin permit request consistent with the NWAP management guidelines. At the first elevation, the Directors agreed with the coastal district, finding the cabin proposal inconsistent with the Bering Straits CRSA plan, though they apparently relied primarily on the language in the NWAP, since neither the regional or Director level decision addressed ACMP policies. In the second elevation, the Commissioners reversed this, focusing strictly on coastal district plan policies and reached a decision with which the coastal district disagreed. The CPC Hearing Officer agreed with the Commissioners and affirmed that use of NWAP policies was beyond the authority of the CPC (ACMP). However, the Superior Court reversed this, ruling that the CPC was correct in measuring project compatibility with the guidelines of the NWAP.

In both the Winkelman and Goodnews Bay cases the coastal districts' consistency review focused in part on the concerns about the DNR adjudicatory process for its own permits and authorities (trapping cabin and offshore prospecting permit issuance). Review of the case files reveals that particularly in the Goodnews Bay case, both the coastal district and state agencies were confused about how to mesh ACMP related reviews and the Offshore Prospecting Permit review process.

Despite confusion over the details of meshing the ACMP consistency review and the DNR trapping cabin permit review the Winkelman case also shows how a coastal district can get its subsistence related concerns more effectively addressed when it strives to nurture a close working relationship with state agency permitting staff.

Solution 2B-1.

Clarify the relationship between the ACMP and state agency plans and authorities, including the issue of due deference. This issue is being considered by the ACMP Streamlining task force.

Problem 2C. Policies that encourage new settlement or new uses of land or resources in rural areas are often perceived as a threat to subsistence uses and community well-being by residents of rural coastal districts.

Two of the cases examined (Timber Creek and Winkelman) involve conflict between local resident's views of how subsistence should be protected, and state policies that give exclusive use of land (by lease or purchase) to one party (such as trapping cabin permits).

People in rural Alaska are strongly concerned about the removal of land from communal use. They see the transfer of land into private hands, and the development of private claims to land and resources as one of the greatest threats to their long term well being. The concept of private ownership of land and resources is in exact opposition to traditional land use principles in Western and Northern Alaska.

State land leasing and disposal policies, such as the trapping cabin permit program, are broadly viewed in rural communities as in basic conflict with local districts' interests in maintaining subsistence opportunities. They are seen as benefiting non-local residents, and bringing them into villagers' backyards. Rainery has described the problems associated with the impacts of state land disposal policies on subsistence in considerable detail (1985). The ADFG Division of Subsistence has also completed studies that document the impacts on subsistence uses by local communities of improved access, land disposal policies, and settlement in rural areas (Wolfe and Walker, 1988).

Concerns about subsistence impacts received considerable attention in DNR's Northwest Area Plan. Extra notification is required for trapping cabin permits in rural coastal districts for example. Land disposals in rural areas are not currently a state priority. DNR is not funded for such programs, and they are not included in its funding requests. While the state trapping cabin program is only intended to provide shelter for trapping activities, and is a lease arrangement rather than sale of land, it may result in some shifts in trapping pressure, and raises concerns among some rural communities about bringing new uses and users into areas already heavily used for subsistence purposes.

Solution 2C-1.

Use existing ACMP tools more effectively to address the potential impacts of conveyance of land or interests in rural coastal districts.

Many of the potential solutions identified in other sections could be used to address rural coastal districts' subsistence related concerns about conveyance of land or interests in land. Districts concerned about these issues should evaluate whether their existing plans adequately address them, and if necessary amend them to reflect their concerns. The Winkelman case points to some potential solutions. These include the coastal district working closely with agencies to sensitize their staff to local concerns and to assist them in developing regulations that address such concerns. They also include creating joint CRSA and agency AMSA's that zone for allowed uses, and prohibit land disposals or certain types of uses in certain areas.

*Granting
permits to
local concerns*

3. COASTAL MANAGEMENT PLANS

Problem 3A. Some rural coastal district plans do not adequately document specific subsistence resources, uses, or use areas that are of concern.

All four coastal district plans studied did a good job of generally describing the importance of subsistence to residents of the coastal district. They all had fairly strong sections outlining general background about subsistence. However, some of them were not as strong as they could have been.

Would districts agree with this solution?

Solution 3A-1.

Amend plans to more explicitly describe and document subsistence concerns. The subsistence protections in several of the plans could be strengthened significantly by more systematically: 1) describing and recognizing subsistence concerns; 2) defining them; 3) stating that they will be considered in the plan; 4) developing specific subsistence zones or policies as applicable.

Solution 3A-2.

Develop and identify procedures that the district will use in compiling and documenting local knowledge. (See discussion below regarding local knowledge -- under problems 4B & 4C).

procedures for compiling local knowledge

Problem 3B. Some rural coastal district plans lack subsistence zone designations.

As noted above, the ACMP subsistence standard is not well understood or regularly used by coastal districts or agencies. In the four case studies, some coastal district plans did not identify areas important for subsistence, or subsistence zones. For example the Cenaliulriit plan did not identify the waters of Goodnews Bay as a subsistence zone, or provide specific policies for its protection. Similarly the Bering Straits CMP was not clear about the boundaries of Special Use Areas.

Some of the plans treat subsistence in such broad and holistic terms that it is difficult to translate them into action. The Cenaliulriit plan, for example, takes a very sweeping view of subsistence, stating that "For the purpose of coastal management, the entire coastal zone is a subsistence zone..." (CCMP, p. 6-11). The Bering Straits CMP is more specific in designating areas important for subsistence, and policies, but lacks specific policies concerning the issue of land settlement policy. The NANA CMP is much more specific, and the Bristol Bay CMP most specific of all, with its AMSA plan for the Nushagak-Mulchatna River area.

Solution 3B-1.

Review subsistence protection measures in coastal district plans, including subsistence zones, Special Area Plans, and specific policies.

Solution 3B-2.

Decide whether subsistence zones or AMSA's are an appropriate tool to use in cases where serious conflicts exist or are developing.

As noted above rural coastal districts have concerns about the use of subsistence zones. First, districts want to continue to have flexibility in balancing competing uses. The subsistence zone approach reduces this flexibility. Second, the realities of subsistence land use are difficult to translate into fixed lines on a map or on the ground. The fish and wildlife used for subsistence move and vary in distribution and abundance over time, and subsistence use patterns shift in response to these environmental conditions, as well as for other social and economic reasons. Additionally, different areas are important to different groups of people. These raise the problem of what criteria should be used for defining areas as "most important" for subsistence. Emphasizing one area as important implies that other areas not so identified are not as important, yet they may be extremely important at particular times, under particular conditions, or to particular people. These variables are difficult to pin down or to map.

subsistence zones reduce flexibility

what criteria to use?

Problem 3C. Some rural coastal district plans fail to specifically identify local concerns about subsistence uses or to include strong policies for addressing them.

Several of the coastal plans involved in the four cases did not contain clear and predictable policy direction for the regulation of specific uses of particular concern. In the effort to strike a balance between the environment and development they do not follow through from broad goal statements to provide strong direction about how uses likely to conflict with subsistence should be treated. They either did not prohibit the proposed use, or did not identify the areas where the project was proposed as important for subsistence, or did not have clear policies for protecting subsistence.

For example the Bering Straits CMP did not specifically address trapping cabins and did not spell out its relationship to DNR's Northwest Area Plan. The Timber Creek case provides a natural experiment in applying two different sets of subsistence related policies to a single situation, with two different outcomes. In contrast to the Bering Straits CMP, which had little specific information relating to trapping cabins, or the impacts of land disposals on subsistence, the NWAP had clear strong language that addressed local residents' concerns and discouraged permanent shelters because they were not the traditional pattern for trapping in the region. The NWAP provided the Directors with justification for upholding the district's position, while the BSCMP was used by the Commissioners to reverse it. This indicates that stronger language in the BSCMP might have provided an outcome satisfactory to the district.

*who developed
plan? →*

The problem of overly general policies in district plans is particularly significant for the issues of competition for resources, potential displacement of existing uses, and indirect or cumulative impacts. Direct impacts on fish and wildlife are typically more clearly addressed and strongly supported in coastal district plans.

Solution 3C-1.

Review subsistence policies in coastal district plans. Amend plans to strengthen subsistence policies and to implement changes proposed under Solutions 2A and 2B above .

4. THE CONSISTENCY REVIEW PROCESS

Coastal district staff frequently note their frustration that subsistence uses are not given equal weight with other types of resource and land uses during consistency reviews. They are also frustrated because it seems that for every review they have to reaffirm and defend the importance of subsistence to their region, despite the clear priority that it receives in district plans. They believe that agencies need to take more responsibility for ensuring that subsistence values are protected. On the other hand, districts do not use existing subsistence policies and information as effectively as they could. This section identifies problems and potential solutions that address both of these issues.

Problem 4A. Coastal District subsistence policies are not always used effectively.

In two of the cases (Kotzebue 58 and Timber Creek) neither the coastal district or state agencies thoroughly and systematically applied district subsistence policies during the consistency determination. This weakened the district's comments in both cases, and contributed to the complexity of the Timber Creek appeals. In the Kotzebue 58 case, the district, while listing a number of applicable policies, left out one of the strongest policies dealing with the Escholtz Bay Special Use Area. The USFWS and ADF&G provided data that supported the subsistence concerns of the district. This could be even more valuable if the coastal district tied this data to their subsistence policies, or if the agencies cited these policies.

*only want to
join information
gathered?*

There has been an ongoing dispute about the respective responsibilities for addressing coastal district policies in consistency reviews. In October 1997 the Coastal Policy Council approved a recommendation that says that "It is the primary responsibility of the districts, not state agencies, to raise the applicability of a specific district enforceable policy during the consistency review process."

*whose
responsibility
to look out
for district's
interests?*

In order for districts and agencies to carry out their charge under the ACMP subsistence standard to "recognize and assure opportunities for subsistence usage of coastal areas and resources," they need to work together to ensure that district policies are incorporated into consistency reviews. Clearly this is an area where coastal districts could use greater technical assistance from agencies.

Yes!

Solution 4A-1.

Get guidance from state agencies about what information about subsistence is most useful to them, and in what form it is most useful. A more detailed assessment is needed to go beyond the general findings of this study, and to draw more widely on the experience of agency staff. A joint workshop format, with coastal district and agency staff, would probably be the most useful way to do this.

*✓
workshop*

Solution 4A-2.

Give coastal district and agency staff practice and experience in using coastal district subsistence policies and including them in consistency reviews. In addition to (or instead of) basic and generalized ACMP consistency review training at coastal district conferences, send DGC permit review coordinators out to rural coastal districts to conduct workshops tailored to the specific goals and policies of the district plan. Training should include mock projects (typical of those that occur in the district) and work with the district to craft consistency comments that cite district plan policies and related rationale. Include practice documenting and communicating local knowledge relevant to the mock project and a discussion about which agencies may have helpful scientific data to contribute.

what are they?

training

Solution 4A-3

Clarify that agencies should assist coastal districts in identifying and raising the applicability of district enforceable policies relating to subsistence during the consistency review process.

*work
together!*

*include:
part of performance
expectations*

Problem 4B. Assessments of impacts to subsistence in consistency reviews are often incomplete, superficial, or poorly documented. Cumulative impacts and indirect impacts are often poorly addressed.

The four case studies and interviews revealed that treatment of impacts to subsistence uses in consistency reviews in rural coastal districts are often inadequate.

Existing scientific information that could support coastal district's subsistence related concerns is also sometimes not effectively brought into the consistency review. In the cases examined, none of the coastal districts used scientific data to support their comments about impacts on subsistence. In the Kotzebue 58 case, both a state and federal agency brought scientific information about impacts to subsistence resources to bear on the consistency review, providing significant support for the local district's position. Similarly, in the Goodnews case, ADF&G information about impacts to fisheries played a key role in persuading DNR to modify the size and location of the project.

ADF&G's Division of Subsistence, which is a potential source of support for rural districts, has never had staff or funds to provide significant assistance to the rural coastal districts. Upon request they provide existing data, including maps, reports and survey results, to the districts or to consultants working on district plans. The Division of Subsistence is seldom contacted for its input or views during consistency reviews.

A related problem is that cumulative impacts to subsistence sometimes are not adequately considered. The cumulative impacts of increasing pressures on subsistence uses from new land uses were inadequately addressed in several of the consistency reviews. In all four cases the rural districts had underlying concerns about changes that could reduce existing subsistence options. While sometimes difficult to reconcile with the projected impacts of a specific case, this is essentially a concern about incremental impacts and cumulative impacts to subsistence opportunities.

Some of the evidence that state land disposals could impact subsistence opportunities is discussed in Rainery (1984, esp. 72-104). He notes that the "two major areas of conflict between current land and resource users and potential users brought into remote areas on the heels of State land offerings will be competition for fish and wildlife resources and the reduction of fish and wildlife habitat." (p. 96.) As noted elsewhere it is easier to demonstrate potential effects of habitat loss or direct impacts to fish and wildlife than for competition.

Greater use of local knowledge is an obvious potential solution to some of these problems. Local residents are extremely knowledgeable about local environmental conditions and subsistence use patterns. However, local knowledge is often ineffectively used during consistency reviews. Sometimes local knowledge is referred to in an ad hoc way during the project permit review stage, instead of being based on materials built solidly into district plans or documented in a systematic way. This makes it more likely that local knowledge will be dismissed as biased and politically motivated in disputes over competing land uses.

Sometimes districts had trouble communicating their concerns about subsistence impacts to agencies. They had difficulty in tying local knowledge about subsistence uses and impacts directly to district policies and the project that's being reviewed in ways that permitters can understand and incorporate into the consistency determination.

In several of the cases consistency reviews and comments about impacts to subsistence were relatively superficial. In some cases districts pointed out concerns with little supporting documentation. This was the case in the Goodnews Bay, Timber Creek, and Winkelman cases, where the district initially listed general concerns about impacts. As these cases moved forward the district identified more specific issues, and drew specifically on local knowledge about environmental factors and subsistence uses. However this made it look as if the district was raising new issues to justify its position, potentially weakening its credibility with the reviewing agency. It seems clear that local knowledge was disregarded or downplayed during permit reviews in the Timber Creek case because it was not directly tied to district policies/plans and because it was viewed as biased or politically motivated.

In the Kotzebue 58 case, by contrast, concerns about direct impacts on both resources and subsistence hunting (e.g. chasing marine mammals away) are clearly articulated up front in comments about proposal. However, in this case too, local knowledge was not brought to bear as strongly as it might have been if more background information had been presented.

This was a greater problem in addressing district concerns about competition for resources than it was in cases of direct impacts to fish and wildlife. The district comments on Kotzebue 58, focusing on direct impacts to marine mammals, fish, birds, etc. were more compelling than the vaguer concerns expressed in the Timber Creek case about the impacts of cabins and increased competition for resources.

A related problem is lack of trust of agencies by local people. They are reluctant to share information about their subsistence uses out of concern that information will be used against local people.

TRUST!

Solution 4B-1.

Develop linkages between coastal district staff and agencies that can provide scientific data on impacts related to subsistence. Train coastal district staff in making effective use of these data in their reviews.

Closer relationships with state and federal agencies with expertise on both subsistence resources and subsistence uses could be developed. A variety of federal agencies are increasingly dealing with subsistence. ADF&G's Division of Subsistence might be able to provide technical assistance to the coastal districts on an as-needed basis. Data gaps that might be filled with information from agency files, reports, or Community Subsistence Database could be identified. Additional work, including data collection, might be planned to address remaining subsistence data gaps, perhaps through collaborative projects. The Division of Subsistence has successfully provided technical assistance to some Native organizations who are taking on more subsistence data collection responsibilities.

✓
joint data
collection

Agencies such as the Division of Subsistence could also provide assistance in identifying ways to effectively analyze and present "scientific" data and local knowledge to agencies during the consistency review.

YES!

Solution 4B-2.

Develop models for using and documenting local knowledge, and train coastal district and agency staff in using them. One way to accomplish this might be to conduct workshops in which district and agency staff work through situations dealing with subsistence impacts together, and jointly develop a model for using and documenting local knowledge which could be applied to other consistency reviews. Again ADF&G's Division of Subsistence might be able to provide valuable

develop model

workshops

"work together"

technical assistance, drawing from their experience with fish and game regulatory issues.

Solution 4B-3.

consider indirect and cumulative impacts

Recognize and consider indirect and cumulative impacts to subsistence.

As discussed above, under Problem 2B, consistency reviews should explicitly consider the potential indirect and cumulative impacts of the project and likely related events on subsistence uses. This is most effective when indirect and cumulative impacts have been considered during the development of district plans and affected parties have a chance to participate in discussions about them.

As noted above, however, a number of efforts have been made to develop guidelines for addressing cumulative impacts in consistency reviews and other impact assessments. None have been particularly successful, and this issue remains unresolved. More explicit attention to subsistence concerns generally, and to local knowledge, may help address these concerns in rural coastal district implementation.

Solution 4B-4.

Address rural communities' concerns about potential misuse of information about their subsistence uses.

Some rural coastal districts are concerned that residents of communities involved extensively in subsistence are afraid to provide information about these activities. They argue that this makes it more difficult to get the information required for coastal district plans and comments on consistency reviews. They note that villagers are concerned that providing these data may lead to restrictions on their resource harvesting, or may attract competing uses and users. They also note that other resource users, such as the oil industry, are able to keep information about their uses confidential.

Not ADF&G's expertise!

This issue can probably be best addressed through better communication. For example, individual subsistence users names or patterns of harvest are never required for ACMP purposes. Information can be generalized so that special harvest locations are not revealed. The ADF&G Division of Subsistence has dealt extensively with these types of issues in compiling data on subsistence uses, and has developed procedures for working with communities to address these types of concerns. However any formal provisions for ensuring confidentiality would evidently require statutory change.

Problem 4C. Rural coastal districts and permitting agencies are unclear about what weight local knowledge should carry in consistency reviews compared with scientific data or best professional judgment.

As noted above, local knowledge is of great value to agencies and to the public in improving our limited knowledge of local environmental conditions and human uses. In this respect it supplements and complements scientific data and best professional judgment, which each have major limitations, particularly in addressing subsistence in rural Alaska.

However, rural coastal districts tend to see local knowledge as receiving relatively little weight in consistency reviews. In two of the cases studied it appeared that agencies gave limited consideration to local knowledge compared to scientific data or best professional judgment. This was evident at certain stages of the Goodnews Bay case. It also appears, from the record of the Timber Creek case, that neither the Hearing Officer, or the Superior Court judge were hearing the subsistence concerns of local residents and the district. As discussed under the section dealing with communication difficulties above, this happens for

a variety of reasons. Agency staff have difficulty understanding the information conveyed by residents, which often seems like opinions or stories to them. To local residents and coastal district staff it appears that non-natives are not listening to their concerns, or do not trust them.

Solution 4C-1.

Adopt regulations to ensure that local knowledge is recognized in the ACMP. Formal recognition of local knowledge in the ACMP, as recommended in the ACMP 309 Assessment, is the first step in addressing this issue. However the definition of local knowledge should include human use of resources.

DGC staff, as part of the ACMP 309 Assessment, have proposed a three step approach to strengthening the role of local knowledge. This includes regulatory changes to 6 AAC 50.120 (Conclusive Consistency Determination) to require that state agencies give "fair consideration" to local knowledge supported in the project review comments submitted by a coastal district. It also would define local knowledge in 6 AAC 50.190. Finally it would revise 6 AAC 85.100 (Implementation), to require a coastal district to identify procedures for using local knowledge when implementing plans.

The CPC recently took action to define local knowledge. However this definition does not clarify whether it encompasses human uses of resources. Without adding "human use of...", this definition of local knowledge will not assist rural coastal districts in their concerns about subsistence that deal with the ways in which local rural residents, and others, harvest and make use of fish and wildlife and other resources. These patterns of harvest and use are particularly difficult to ascertain and identify without the cooperation and assistance of rural residents and communities. They are also an extremely important part of the information needed to determine whether, and how, a proposed project is likely to impact local communities.

Obviously "fair consideration" is a vague term, and rural coastal districts would prefer to see local knowledge treated as having the same reliability and evidentiary weight as scientific knowledge and agency staff "best professional judgment". However, in addition to 4C-2 below, a number of the other potential solutions identified in this Chapter would help rural coastal districts strengthen the way they use local knowledge, and in developing procedures for using local knowledge. The solutions identified under Section 4B, for example, could be used to help bring scientific approaches and local knowledge together, strengthening both.

Solution 4C-2.

Review the way that local knowledge can be used more effectively and develop procedures for using local knowledge in implementing district plans. More important than definitions, however, is the way that local knowledge is implemented in consistency determinations. Districts and agencies need to work together to develop a common understanding of local knowledge and how it can be used. In the four cases examined in this project local knowledge received little explicit attention by coastal districts, agencies, or those who reviewed appeals. A critical first step in improving use of local knowledge is to identify ways it has been used in other situations, and how it could be used more effectively in consistency reviews (see discussions under sections 3A, 4A, and 4B above). Joint agency and district workshops could then be used to develop procedures for using local knowledge in implementing district plans.

Make local knowledge essential part of review process!

If these measures are implemented local knowledge will become part of a triad, along with best professional judgment and scientific data, that is used for decision-making when the conclusive consistency determination is crafted by the coordinating agency.

Problem 4D. Some districts believe that agency definitions of impacts to subsistence are too narrow and restrictive and therefore miss "big picture" district goals of protecting subsistence as a way of life.

Despite general support for use of flexible policies, districts are concerned about the narrow reading of subsistence policies by state agencies that may be technically correct, but are viewed by the district as inconsistent with the central theme of the plan. For example the Bering Straits district pointed out that their CMP contains considerable plan text that discusses the importance of subsistence to the community and the need to protect important fishing and hunting habitat to support subsistence activities. They felt strongly that this central theme should be considered when state agencies are uncertain about the correct interpretation and implementation of plan policies. Moreover, they felt that state agencies ignore important plan text that can help to determine the district's intent in drafting enforceable policies. The districts suggest that using plan text to interpret the meaning of plan policies and considering central themes within the plan would be more effective in interpreting plan policies than the narrow analysis used by state agencies.

The holistic view of subsistence noted in Chapter Four may result in differences in ideas about how subsistence should be represented for planning purposes. For example the Cenaliulrit plan specifically states that it does "not attempt to identify specific hunting or gathering sites." In several cases districts were concerned about providing specific data about subsistence sites and uses. This is a considerably different view from that held by agencies, who want to have specific data and policies that are area specific.

different needs/concerns

Solution 4D-1.

Districts and agencies could work together to better identify the subsistence concerns of rural coastal districts and ways to address them in consistency reviews. The most effective way to address the problems of divergent perspectives and communication seems to be to provide opportunities for mutual learning. One way to accomplish this would be to get district and agency staff together in relatively small groups to work on identifying problems and solutions together. In order to provide continuity during staff turnover, agencies could also use these sessions as the basis for training materials on the role and significance of subsistence. They could also provide opportunities for DGC and state resource agency staff from Anchorage and Fairbanks-based to visit rural coastal districts to gain a better understanding of working conditions and priorities in these areas as well as to improve the relationship between rural coastal districts and the agency staff that permit area projects.

*work together!
"mutual learning"
as collaborative planning
→ Joint problem-solving
working*

Solution 4D-2.

Increase efforts to hire Alaska Natives for agency permitting positions. This would assist agencies in increasing their sensitivity to subsistence issues in rural coastal districts and in identifying ways to improve communications with rural coastal districts and rural communities affected by proposed projects.

Problem 4E. Elevations and court appeals tend to divert attention from basic concerns, are time-consuming and costly, and seldom resolve basic issues of concern to either coastal districts or agencies.

One of the problems of elevations and court appeals is that neither party to such cases tends to find the outcome particularly satisfactory. Even when one party gains part of what it wants from the appeal, it is likely to lose something else of value. In addition specific rulings seldom help improve any party's position over the long run, or help improve the broader ACMP program. Both the Goodnews Bay case and the Timber Creek case illustrate these problems.

As noted in the case analysis for Timber Creek the BSCRSA is pleased with the part of the Superior Court's ruling that clarifies that it can use the NWAP to interpret and support the district's position. However, other parts of the ruling limited due deference to the district to the consistency review, which is much less favorable to the coastal district.

*who are the parties? agencies vs districts?
what about
applicability?*

Additionally the Superior Court ruling led in a very different direction from that which has been built over time for the ACMP. While it has been long been considered appropriate for ACMP and State Area Plans to work together and set out policy direction consistent with one another, the ACMP has always sought to keep the two separate. The Court's ruling blurs this distinction.

Again, while the outcome of the Goodnews Bay case was favorable from the coastal district's perspective, the ruling had little to do with the consistency of the project with the district plan. It dealt with an issue that is important for the broader issue of how the impacts of projects are assessed, and whether a project can be looked at in stages. However, this is essentially a procedural point with little lasting significance for the Cenaliulriit district program. The main effect of the appeal was to delay the project, a desirable outcome from the district perspective, but one that may not assist the district in dealing with future proposals for offshore mining.

Solution 4E-1.

Provide more training in mediation and conflict resolution.

Costly and protracted elevations and appeals are avoided when project issues are successfully resolved during the regional-level consistency review. To increase the times when successful resolution and consensus is achieved, provide training in facilitation, mediation, and problem-solving to DGC and state agency permittees and coastal district staff.

training!

Problem 4F. Rural coastal districts sometimes fail to respond to consistency reviews in a timely or effective manner because they have difficulty in getting information out to potentially affected villages about projects that may affect subsistence, and in getting information back from them about their concerns.

District staff felt that the ability of rural residents to respond to consistency reviews is hampered by the short time frames for getting information about the project out to potentially affected rural communities, and then getting comments back from them. They argue that the public notice system just doesn't work in these areas. Among the problems they cited were the limited number of people with appropriate background and time in most

rural villages, language barriers, unfamiliarity with ACMP and other governmental procedures, and the logistical problems of transportation and communication in rural areas. These combine to make it difficult for coastal coordinators to feel comfortable that local residents understand the implications of projects, that their subsistence and other concerns are being addressed, and that their views are adequately conveyed back to the agencies.

This issue was not identified as particularly significant in the four cases, although it was part of the reason that several communities requested additional hearings during consistency reviews in some of the cases. It was mentioned as a significant issue during interviews with rural coastal district staff. It is obviously closely related to the question of how to make effective use of local knowledge, and needs to be considered in efforts to develop new provisions for using local knowledge.

Ten extra days are presently allowed for comments in some districts for this purpose, but this is viewed by district staff as inadequate for getting meaningful local comment. In addition DGC currently has a policy of stopping the process if a local meeting or hearing is planned that relates to an issue under consideration in the consistency review. This is intended to allow more complete information gathering.

The Bristol Bay CRSA has tried to provide short summaries -- one page descriptions of projects and key issues, but has found that even with this assistance it is often difficult for local people to identify specific subsistence concerns.

Solution 4F-1.

Make better use of pre-application conferences for projects where subsistence is likely to be of concern. Providing for informal discussions between the applicant, district, and agencies early in the consistency determination process can allow for identification of subsistence concerns, potentially affected communities, appropriate public notification procedures, and the possible need for public meetings to address local concerns. These types of discussions occurred in the Goodnews Bay and Winkelman cases.

These types of informal discussion can also allow early clarification of questions of due deference, as proposed by Galvin (1995, p. 19).

Solution 4F-2.

Continue to provide for extended comment periods for projects that affect subsistence in rural coastal districts and for stopping the clock in order to allow information from local meetings or hearings to be incorporated in consistency reviews. This has been built into the Bering Straits plan, for example.

Problem 4G. Some rural coastal districts believe that they are not given due deference concerning subsistence issues.

Some rural coastal districts believe that many of their concerns about ACMP treatment of subsistence could be solved if they were given due deference on subsistence related comments. This issue clearly goes beyond subsistence and the scope of this project. However, several comments related to the findings of this study are in order.

Due deference (6 AAC 50.120) means that deference which is appropriate in the context of the commenter's expertise and area of responsibility, and all evidence available to support

any factual assertions. A coastal district whose district program has been incorporated into the ACMP is considered to have expertise in the interpretation and application of its program. If the coordinating agency rejects a stipulation or recommendation requested by an affected coastal district with an approved program, the coordinating agency shall make a written finding stating the reasons for rejecting the stipulation.

At issue is how resolution will be achieved when a conflicts exists between local knowledge and agency best professional judgment. When due deference is determined, will coastal district's local knowledge comments receive the same weight as agency best professional judgment or scientific data?

The CPC recently adopted Operating Principles of the ACMP which begins by noting that with regard to respective roles within the ACMP:

What makes due deference work is our consensus approach which is built on mutual respect and communication with all involved parties. This will work as long as we maintain our willingness to discuss concerns that arise in the consistency review process.

This reinforces how important communication and consensus-building are in making local knowledge and due deference work and also bolsters the training recommendations made above. The ACMP Assessment is continuing to flesh out improvements to the due deference concept, which are beyond the scope of this report. However, it is emphasized that how due deference is given (or not given) to coastal district's local knowledge on human use of resources in their region is directly related to how well rural coastal district subsistence-related concerns will be addressed by the ACMP program.

In order for this approach to be successful, local knowledge needs to receive greater formal recognition. The definition of local knowledge also needs to includes human use of resources.

YES!

really?

Need a better process for consensus approach

willingness to discuss concerns

YES!

need for training!

can't separate them

formal recognition

6.0 RECOMMENDATIONS

*assistance in working together
to mutually develop solutions!*

✓ The potential solutions described in Chapter 5 were discussed with the RCDI Task Force at two meetings. The RCDI Task Force agreed that while there are weaknesses with some ACMP policies, a more significant problem was failure to effectively use the existing policies and tools provided in the ACMP to protect subsistence. They saw the most productive short-term solutions as providing technical assistance to rural coastal districts, and districts and agencies working together to mutually develop solutions.

Discussions with the Task Force resulted in four sets of recommendations. The first are high priority solutions that can be implemented over the short-term without major ACMP policy changes. The second are medium priority solutions. Third are longer-term solutions that may require changes to districts plans, the ACMP, or other state policy or program shifts. The last set of solutions include those currently being pursued by some rural areas to give them greater influence in coastal zone management, including more integration of subsistence concerns, into borough and cities' Title 29 planning and zoning powers.

HIGH PRIORITY -- USE EXISTING TOOLS MORE EFFECTIVELY.

✓ The RCDI Task Force agreed that rural coastal districts' expertise on subsistence should be recognized in the ACMP. However the districts need more technical assistance from agencies in order to make sure that subsistence concerns are adequately addressed in the ACMP. The Task Force also agreed that increasing agency permitting staff's knowledge and understanding of subsistence and rural Alaska would also help address rural coastal district concerns. Five recommendations for high-priority, short-term solutions resulted:

1) Incorporate Local Knowledge.

training Incorporating rural residents' wealth of local knowledge about local environmental conditions and subsistence patterns as an integral part of rural coastal district plans and consistency reviews is a high priority. This requires developing more effective ways to compile and document local knowledge (Solution 4C-2) as well as training in gathering, documenting and communicating local knowledge (Solution 4B-2).

2) Make Better Use of Pre-application Conferences.

These conferences, which are now sometimes used, should be regularly used to identify and address concerns about subsistence (Solution 4F-1).

3) Provide Technical Assistance

Agencies should work with rural coastal districts to develop a program of technical assistance for improving the way that subsistence is dealt with in consistency reviews. Specifically this program should:

- a) Identify what subsistence information is most useful to permitting agencies, and how it can be most effectively communicated (Solution 4A-1, 4D-1, 4B-3). Create a stronger link between rural coastal districts and resource agencies (USFWS, NMFS, ADF&G) to make better use of scientific data in support of subsistence concerns (Solution 4B-1).

11 How can subsistence concerns be effectively implemented in the ACMP?

- b) Give the Division of Subsistence a more formal and active role in the ACMP program, particularly for rural coastal districts.
- c) Provide opportunities for training and practice to coastal district and agency staff in the use of coastal district subsistence policies during consistency reviews (Solution 4A-2). Use joint workshops to review the whole range of subsistence protection measures in rural coastal district plans (Solution 3B-1). *workshops*
- d) Update the ACMP Agency Implementation Manual to incorporate guidance concerning subsistence.

One way to implement these recommendations is to conduct a series of regional workshops that address how subsistence concerns can be effectively implemented in the ACMP. These should take place in rural coastal districts, and should include subsistence specialists as well as agency permitting and coastal district staff. A spin-off benefit of such an approach would be to provide more opportunities for agency staff involved in permitting to learn about subsistence and rural life. The ADF&G Division of Subsistence should be approached about assisting in these forums; however the Division is currently not funded to provide broader technical assistance. *workshops*

4) Extend Comment Periods.

Continue to provide for extended comment periods for projects that affect subsistence in rural coastal districts and for stopping the clock in order to allow information from local meetings or hearings to be incorporated in consistency reviews (Solution 4F-2).

5) Monitor Implementation Efforts.

The work of the Rural Coastal District Implementation (RCDI) Task Force has made a valuable start in addressing rural coastal districts' concerns about subsistence. Its efforts should be continued. The recommendations made above are relatively small policy shifts that cumulatively can significantly improve the way subsistence concerns are addressed in the ACMP. It is important therefore to monitor and evaluate whether these suggestions are being implemented, and having the desired effect. The RCDI Task Force should be directed to oversee and monitor implementation of these recommendations and to report back to the CPC in one year.

MEDIUM PRIORITY

This category includes additional recommendations that would contribute to more effectively addressing rural coastal district's subsistence concerns, but which have a lower priority or may require longer periods of time to implement.

1) Training in conflict resolution.

Provide agency and coastal district staff with more training in mediation and conflict resolution (Solution 4E-1). *training in dispute resolution*

2) Local Knowledge

- a) Develop and identify procedures that the district will use in compiling and documenting local knowledge (Solution 3A-2).
- b) Adopt regulations to clarify that local knowledge is recognized in the ACMP (Solution 4C-1). The regulatory definition should include "human use of resources".

- c) identify ways to address rural communities' concerns about potential misuse of their local knowledge about subsistence uses (Solution 4B-4).

3) Provide Technical Assistance

Develop guidelines for using the subsistence standard, including clarification that indirect and cumulative impacts to subsistence can be considered (Solution 2A-1).

4) Hiring Practices.

Increase efforts to hire Alaska Natives for agency permitting positions (Solution 4D-2).

LOW PRIORITY/LONGER TERM -- DEVELOP NEW TOOLS OR IMPROVE EXISTING ONES.

In addition to the short-term solutions identified above, the analysis completed as part of this report and the RCDI Task Force identified areas where new tools or improvements to existing ACMP tools could help address rural coastal district's subsistence concerns.

- 1) Clarify the relationship between the ACMP and state agency plans and authorities (Solution 2B-1). These issues are currently being considered under the ACMP Streamlining task force.
- 2) Amend coastal district plans where necessary to more explicitly describe and document subsistence concerns, strengthen subsistence policies (Solution 3A-1), or to develop subsistence zones, Special Area Plans or AMSAs where serious conflicts exist or are developing (Solution 3B-2). The review of subsistence protection measures recommended above should help identify areas where these extra efforts are warranted.
- 3) Continue efforts to develop guidelines for considering and assessing cumulative impacts to subsistence and other coastal values (Solution 4B-3).

*... but district
concerns about
map boundaries*

USE TITLE 29 POWERS TO ACHIEVE ACMP/COASTAL MANAGEMENT GOALS.

Some observers and participants have proposed borough formation as one solution to a perceived lack of influence by rural coastal districts over activities in the coastal zone, including those that affect subsistence. A suggested alternative, some sort of delegation of Title 29 planning and zoning authorities to coastal resource service areas, would require legislative action. Assessment of these options is beyond the scope of this project, and is being pursued by DCRA and individual boroughs.

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APPENDICES

Appendix A. Potential Cases Identified.

Case	Project Number	Area
Kotzebue Sound 58	AK9604-21AA	Northwest Arctic Borough
Port Clarence 10	AK9604-20AA	Bering Straits CRSA
Goodnews Bay Offshore		
Prospecting Permit(s)		Cenaliulriit CRSA
Timber Creek Trapping Cabin	ADL 414443	Bering Straits CRSA
Pah River Fish Guiding Camp	LAS 20243	Northwest Arctic Borough
Norton Sound 72 (ongoing)	State ID no. 9607-01AA	Bering Strait CRSA
Nushagak River gravel extraction	AK840103-05A	Bristol Bay CRSA
Alaska Peninsula Fishing Lodge	AK870626-26A	Bristol Bay CRSA
Norton Sound 74	AK9509-09AA	Bering Straits CRSA
Port Clarence Canmar		
drilling rig storage		Bering Straits CRSA
Various Bristol Bay fishing		
lodge/trapping cabin permits		Bristol Bay CRSA
Various Kobuk-Pah River area permits		Northwest Arctic Borough

Case Summaries

Kotzebue Sound 58

In 1996 a project was proposed to conduct a dredge mining operation in the waters off of Port Clarence. The project was opposed by the Northwest Arctic Borough, several local governments and Tribal organizations. The project was found inconsistent with coastal plan policies due to impacts on subsistence activities and fish, wildlife, and marine mammal habitat that supported subsistence activities. The U.S. Fish and Wildlife Service submitted written comments that cited several studies that justified the concerns of local governments and Tribal organizations.

Port Clarence 10

A second, simultaneous application was submitted by the same company as in the Kotzebue 58 case to conduct a dredge mining operation. The project was also opposed by the Bering Straits Coastal Resource Service Area (BSCRSA) coastal district and local governments and Tribal organizations and was also found inconsistent with coastal plan policies. It contained a similar analysis of policy issues as contained in Kotzebue 58 with more specific attention policy prescriptions for off shore activities, siltation and sedimentation in important habitat areas.

Goodnews Bay Offshore Prospecting Permits

The Cenaliulriit CRSA and local communities opposed a proposal in 1989 that required DNR to open five tracts for offshore prospecting. Concerns about impacts to fish and marine mammals used for subsistence were raised by these groups as well as by ADF&G. A Cenaliulriit CRSA petition to the Coastal Policy Council (CPC) in 1990 was rejected on the grounds that it was not supported by sufficient evidence. However, the CPC was directed by the Superior Court to take up the petition. This case involves the issue of direct impacts on fish and wildlife resources used for subsistence, and of cumulative impacts on

these resources. It also raises questions about the roles of local knowledge, best professional judgment, and agency expertise, as well as the application of consistency findings and due deference.

Timber Creek Trapping Cabin

The DNR Northwest Area Plan discourages permanent trapping cabins to avoid conflicts with subsistence patterns, but does not prohibit them. A hunting guide from outside the region applied to build a trapping cabin within a permit notification zone which the Bering Straits CRSA Coastal Management Plan identifies as important for subsistence. The Bering Straits CRSA recommended that a permanent cabin be found inconsistent with the BSCMP on subsistence grounds, and recommended a temporary tent structure be allowed. DNR issued the permit for a permanent structure. This decision was appealed by the District, and reversed at the Director level. The applicant elevated to the Commissioner level, where the cabin permit was reinstated. The coastal district filed a petition to the CPC, which was rejected. The coastal district took the case to Superior Court which found in favor of the applicant and the State. The case is currently under appeal to the State Supreme Court. This issue involves questions of cumulative impacts on local subsistence uses, of social/cultural differences in perceptions of subsistence, and interpretations of due deference.

Norton Sound 72 (State ID # 9607-01AA)

This is a recent case that involves a proposed small commercial suction gold dredging off the coast near Nome. Subsistence concerns have been raised by the local district. It has not been resolved.

Nushagak River Gravel Extraction for Portage Creek Village Airstrip (AK840103-05A) January, 1984

No approved district plan in place at the time of the action. ADF&G and others raised concerns about impacts on fish and wildlife, and subsistence use of these resources. The Bristol Bay CRSA emphasized lack of consideration of alternative gravel sources. DOT eventually used upland gravel instead of river.

Alaska Peninsula Fishing Lodge (AK870626-26A) August, 1988

Proposed fishing lodge on the Unangashak River resulted in coastal district and agency concerns for subsistence and fisheries habitat. DNR originally denied application based on the state's Bristol Bay Area Plan, but then reversed. The Bristol Bay CRSA recommended a series of stipulations that were incorporated into the permit.

From the coastal district perspective, issues with this project were successfully resolved through direct consultation between the applicant and representatives of Teller/Brevig. This headed off potential local concerns. DNR issued the permit.

Various Bristol Bay Fishing Lodge/Trapping Cabin Permits

A number of conflicts over fishing lodge and trapping cabin permits in the Bristol Bay region have been dealt with through development of the Nushagak-Mulchatna Rivers Recreation Management Plan, which is a DNR management plan, supplements the state Bristol Bay Area Plan, and is a Bristol Bay CRSA AMSA plan. The provisions of the plan outline where, and under what conditions, permits can be issued. The history of development of the plan, and its implementation provide a variety of cases of efforts by the BBCRSA to deal with subsistence concerns of local villages through close involvement with DNR, ADF&G and other agencies and Native village corporations. These cases illustrate how the plan has worked and could provide valuable comparisons and contrasts with how these types of issues have been dealt with in Northwest Alaska.

Various Kobuk-Pah River Fishing Lodge/Trapping Cabin Permits

Several conflicts have developed over various DNR permits in this area. Since the early 1980's the coastal district and local communities have expressed concern over impacts to subsistence arising from proposed projects. These include the Mortvedt case, which involving a series of projects that variously included mining claims, a personal use cabin, and a trapping cabin. Permits for these projects were eventually denied.

The Pah River Fish Guiding Camp (LAS 20243) is the most recent of the cases in this area. A sport fishing operator wanted to place fish guiding camp near the confluence of the Pah and Kobuk rivers. DGC and DNR coordinated with Northwest Arctic Borough to get local input. The local communities of Kobuk, Shungnak, and Ambler objected through the consistency review process. The permit was denied based in part on state fisheries data and archeological evidence. NAB viewed this information as playing a significant role in successful resolution.

Appendix B. People Interviewed.

Chuck Degnan, Bering Straits CRSA
Sue Flensburg, Bristol Bay CRSA
Arleen Murphy, DGC
Frank Stein, Northwest Arctic Borough
Nelda Warkentin, DCRA
Glenn Seaman, ADF&G ACMP Coordinator
Al Ott, Habitat Division, ADF&G, Fairbanks
Faye Heitz, DGC
Maureen McRae, DGC
Roselyn Ressa-Smith, DNR
Chris Milles, DNR
Tim Rumpfelt, DEC
Victor Karmin, NWAB ACMP Coordinator
Roselyn Ressa-Smith, DNR
Kerwin Krause, DNR
George Owletuck, Cenaliulriit CRSA
Terry Haynes, Division of Subsistence, ADF&G.

Appendix C. Case Chronologies.

TIMBER CREEK: Trapping Cabin Case

July 1990 Mr. Koontz filed an Application for Trapping Cabin Construction Permit with the Alaska Department of Natural Resources, Division of Land (DL).

February to

March 1991 The DL notified the State Department of Community and Regional Affairs (DCRA), the State Department of Fish and Game (ADF&G) and 22 Native corporations, villages, and organizations located in the region of the proposed cabin permit application, including Bering Straits and the Koyuk IRA Council. The record indicates that the notifications were accomplished by certified mail and the DL assumed responsibility for mailing the application notice. The notice requested comments regarding the consistency of the activity proposed with the standards of the ACMP and the BSCRSA CMP.

March to

April 1991 The DL and the Alaska Department of Fish and Game responded to the request for comments and stated that they had no objections to the proposed trapping cabin and found it consistent with the ACMP. The Elim Native Corporation, The Bering Straits CRSA, City of White Mountain, and Koyuk Native Corporation objected to the proposed cabin because of its impacts to local subsistence hunting and trapping activities, and its inconsistency with BSCSA CMP policies. A number of letters also expressed concern that Mr. Koontz would utilize the cabin for commercial purposes, contrary to the proposed purpose stated in the application. A petition containing 47 signatures of residents of Koyuk was submitted to the Division of Governmental Coordination (Fairbanks) opposing the proposed cabin. The petition stated that, "we feel that a cabin in the area would interfere with our subsistence lifestyle, as the area is a primary source of moose,

caribou meat; also for a source of income for individuals who trap there." No mention of the consistency of the proposed trapping cabin with the BSCMP is made in the petition language.

September to
November
1991

The DL sent copies of these comments to Mr. Koontz and requested that he respond to the concerns raised. Additionally, the DL sought comments from Bob Nelson, an area biologist with the ADF&G, Division of Wildlife Conservation (DWC) and Steve Clautice of the DNR Division of Forestry (DF). Mr. Koontz wrote a letter responding to some of the concerns expressed by local villages and Native Corporations. He explained that the cabin was *not* to be used for commercial guiding, explained his construction techniques, and explained that the cabin will have minimal impact on the environment and harvest levels in the area. He explained that, "he couldn't help feeling that objections to me having a cabin is because of my race." Mr. Nelson felt, that based on his personal knowledge and DWC records, relatively few residents from local villages harvested furs from the area. Steve Clautice commented that there was sufficient timber in the cabin area, and that selective timber harvest for cabin construction could be beneficial if done correctly.

Dec. 1991 The DL forwarded Mr. Koontz's responsive comments to Chuck Degnan of the Bering Straits Coastal Resource Service Area and Guy Martin of the Bering Straits Native Corporation for additional comments. Mr. Degnan circulated Mr. Koontz's comments to the same villages and Native Organizations notified previously. Mr. Koontz then responded to the new comments, explaining that he would construct the cabin carefully using techniques that would be sensitive to the environment, that the cabin would not disrupt the caribou migration, that he was a 'legitimate subsistence' hunter that used traditional methods, and that he had contributed meat to many people in surrounding villages.

March 1992 After this final round of comment exchange, the Northern Regional Office of the Division of Land issued a Proposed Consistency Determination stating that the project was consistent with the ACMP and the BSCMP subject to four stipulations. The four stipulations required that Mr. Koontz only use the cabin for activities related to trapping; that he use best efforts minimize disturbance to big game animals; that he comply with accepted forest practices in cutting logs for the cabin; and that he maintain the cabin in a "fire safe" manner. The letter further advised Mr. Koontz that this was only a "Proposed Consistency Determination." Chuck Degnan, on behalf of the BSCRSA, sent a letter to the DL requesting "elevation" of the DL's proposed consistency determination to the "director level."

May 1992 Mr. Koontz received notice of the directors' determination through a May 27, 1992 from Roselynn Ressa Smith, Coastal Program Liaison for the DL. The letter advised that the directors of the Alaska Departments of Natural Resources, Environmental Conservation, and Fish and Game had concluded that while the project was consistent with ACMP, "a permanent shelter was not compatible with the terrain and local use of the area." As an alternative to a trapping cabin, the directors proposed that Mr. Koontz construct a temporary wall tent as a base for his trapping activities. The letter explained: "Tents are consistent with the historic use in the region and are less likely to discourage others from using the area." The letter further advised Mr. Koontz that unless he requested further "elevation" within five days, the "proposed consistency finding" would be adopted as a conclusive consistency determination. A discussion with Roselyn Ressa-Smith indicates that

there is no transcript or meeting notes of the Director's elevation meeting.
(Personal Communication November 8, 1996).

May to

June 1992 Mr. Koontz requested elevation of the directors' decision to the "commissioner level." The matter was then reviewed by the commissioners of the Departments of Natural Resources Fish and Game and Environmental Conservation (the Resource Commissioners). In a Conclusive Cabinet-Level Consistency Finding dated June 18, 1992, Dr. Paul Rusanowski of the Division of Governmental Coordination (DGC) advised Mr. Koontz that the Resource Commissioners met on June 16 and determined that construction of the cabin was consistent with the BSCMP so long as 19 conditions attached to the permit were met. Specifically, the Resource Commissioners concluded that construction of the cabin for the proposed purpose of trapping could not adversely impact or threaten subsistence or customary and traditional use of the area. On June 24, after issuance of this conclusion in a conclusive consistency determination, the DL issued Mr. Koontz a Trapping Cabin Construction Permit. No transcript or notes of the meeting were kept.

July 1992 On July 6, 1992, the Bering Straits CRSA filed a petition with the CPC challenging the Conclusive Cabinet-Level Consistency Finding that construction of a trapping cabin near Timber Creek was consistent with the BSCRSA CMP. The Bering Straits CRSA asserted that the proposed trapping cabin violated Policy A-1 (Subsistence Use), Policy A-4 (Impacts on Subsistence), Policy B-2 (Habitat Alteration), and Policy K (Disposal of Interest) of the BSCMP. Additionally, Bering Straits asserted that the proposed trapping cabin violated Management Guidelines for Remote Cabins, Management Guidelines for Trapping Cabins, and Settlement and Remote Cabin Areas contained the Northwest Area Plan (NWAP). The Native Village of Koyuk IRA Council, filed a petition challenging the Conclusive Cabinet-Level Consistency Finding. Koyuk initially only asserted that issuance of the permit violated the NWAP. Subsequently, Koyuk amended its petition to allege that issuance of the permit also violated the BSCMP. Mr. Koontz and the State of Alaska, Department of Natural Resources (DNR), through the Attorney General's Office, responded to the petitions and asserted that issuance of the permits did not violate either the BSCMP or the NWAP.

Oct. 1992 A Hearing Officer was appointed to hear the petition. The petitions from the District and Native Village of Koyuk, IRA Council were consolidated for the petition hearing. The HO applied the de novo standard of review in determining whether the permit authorizing Mr. Koontz to build a trapping cabin at Timber Creek is consistent with the BSCRSA CMP. Under this analysis, the CPC independently reviews the issues of the Timber Creek Trapping Cabin case on their merits without any deference to the Resource Commissioners' analysis. The HO explains that the de novo standard of review is different from the "substantial evidence" standard the CPC applied in the 1991 Goodnews Bay decision. The decision to apply the de novo standard of review was based on AS 46.40.100 which requires that, upon filing a petition, the CPC is required to convene a public hearing which "shall be held in accordance with the Administrative Procedure Act (APA) (AS 44.62). Since the APA embodies procedures for the conduct of a de novo hearing rather than appellate review procedures, the Hearing Officer concluded that the legislature must have intended that the CPC apply these procedures and conduct its hearing de novo.

May 1993 A five day hearing in Fairbanks commenced on May 3, 1993 and concluded on May 8, 1993. Twenty-one witnesses presented testimony concerning issues related to the consistency of the proposed trapping cabin with BSCRSA CMP policies and NWAP management guidelines. The HO as well as representatives of the Petitioners and Respondents were given the opportunity to ask the witnesses questions. Testimony was given as to the interpretation of the BSCRSA CMP Permit Notification Area (PNA) and Important Use Area (IUA) designations, the impact of the proposed trapping cabin on habitat, movement of wildlife, and traditional uses in the area.

Oct. 1993 The Hearing Officer's Proposed Decision was issued on October 6, 1993. It concluded that the proposed cabin would not result in adverse impacts to subsistence resources or the habitat of subsistence resources, and that the trapping cabin, constructed consistent with permit stipulations, was consistent with the ACMP. The HO ruled that the CPC lacks jurisdiction to consider petitions brought under the NWAP. The ruling noted that even if the CPC had jurisdiction, permit issuance would be consistent with NWAP policies.¹

The Native Village of Koyuk and the Bering Straits Coastal Management Program filed an administrative appeal with the Superior Court for the State of Alaska challenging both the issuance of a trapping cabin permit by DNR and the upholding of the conclusive consistency determination by the CPC which found the activity to be consistent with the Bering Straits Coastal Management Program. The appellees included Harry Noah, Commissioner and Ron Swanson, Director, Division of Lands, Alaska Department of Natural Resources, and the Coastal Policy Council.

May 1996 On May 3, 1996, the Superior Court of Alaska Issued a Memorandum Decision and Order affirming the CPC's decision that the issuance of the trapping cabin permit to Mr. Koontz was consistent with both the BSCRSA and the NWAP. The Superior Court document states that "adverse impacts on subsistence activities have not been shown...The stipulations required by DNR fully mitigate any adverse effects that may be present." The Superior Court reversed the decision of the CPC and ruled that the CPC *does* have jurisdiction to review consistency of Timber Creek project with the NWAP.

¹ However, the HO also concluded that the CPC did not have the statutory authority to enforce the NWAP. The HO based this decision on her analysis of AS 46.40.100 which gives the CPC the authority to determine if a proposed use or activity for which the permit, license or approval is granted is consistent with the requirements imposed by state statute, regulation or local ordinance... The HO concluded that the NWAP is not a "state statute, regulation, or local ordinance" and therefore the CPC has no authority to enforce the NWAP.

Appendix C. Case Chronologies.

KOTZEBUE 58: Nearshore Dredging Case

- April 18, 1996 Surf Food Products, represented by Mr. James Winkle, submits to the Alaska Office of the Governor, Division of Governmental Coordination (DGC) a coastal project questionnaire, applications, required public notices, and supporting information for project consistency review of a proposal to dredge portions of the Kotzebue Sound and Port Clarence for the purposes of placer mining (dredge mining). The submitted project description states that the proposed dredge mining operation will be conducted from the deck of a 60 foot seiner and "is intended to maximize the efficiency of gold dredging technology and investigate untried and untested areas of the Alaskan coastal waters of Kotzebue and Teller."
- April 19, 1996 Mr. Winkle submits an application to the Army Corps of Engineers (COE) for a permit to complete the dredge mining operation. On April 30th, the COE published a 30-day Public Notice for Permit Application requesting comments on the proposed application. The notice included attachments from DGC giving notice of Application for Certification of Consistency with the Alaska Coastal Management Program and requesting comments on the proposed project's consistency with the Alaska Coastal Management Program, and an attachment from the Alaska Department of Environmental Conservation (ADEC), giving notice of an application for State Water Quality Certification and requesting comments on the project's consistency with the Clean Water Act of 1977, the Alaska Water Quality Standards, and other applicable State laws.
- April 29, 1996 DGC notifies Mr. Winkle, state agencies, and Native village governments, corporations and organizations in the Bering Straits CRSA (BS CRSA) of the consistency review.
- May 1, 1996 The COE notifies Mr. Winkle of it's pending comment review process.
- May 7, 1996 DGC notifies all Project Reviewers that the April 29th notice was incorrectly sent to DGC's Bering Straits CRSA mailing list. Instead, it should have been sent to those on DGC's Northwest Arctic Borough (NWAB) distribution mailing list. DGC explains that "Since this project has not been officially started yet, (DGC) is sending all project information to the NWAB distribution for review." The NWAB distribution list includes the Northwest Arctic Borough (NWAB) Planning Director, six NWAB planning commissioners each from different Native Villages in the borough, Maniilaq Association, the Alaska Department of Natural Resources (DNR) State Historic Preservation Office (SHPO), the Alaska Department of Environmental Conservation (ADEC), Department of Natural Resources Division of Land (DL), Alaska Department of Fish and Game (ADF&G), and the Alaska Department of Transportation/Public Facilities (ADOT).
- May 7, 1996 In a letter to DGC, the Native Village of Deering, IRA Council, express their opposition to the permit application due to impacts to their subsistence lifestyle. The letter expresses concerns about the impacts of the dredge mining operation on impacts to marine mammals, including impacts to Beluga whale migration.

- May 15, 1996 In a letter to DGC, the Buckland City Council also opposes the permit application due to potential interference with Oogruk and Beluga hunting areas of Buckland and Deering. The letter explains that subsistence hunters in this area know that the project will harm the Beluga migration route and disturb the Oogruk hunting areas.
- May 16, 1996 In a letter to Mr. Winkle, DGC explains that they have received additional information from DNR Division of Mining showing Mr. Winkle's Placer Mining Application with a much larger area proposed for mining than was included in the original application on file at DGC. Consequently, the new maps were being sent to state reviewers and the COE to be included in a revised COE public notice.
- May 20, 1996 In a letter to DGC, the U.S. Department of Commerce National Oceanic and Atmospheric Administration National Marine Fisheries Service (NOAA NMFS) states that the office believes that the fishery resources in the area can be adequately protected from project impacts with standard conditions of the permit.
- May 20, 1996 In a letter to DGC, the City of Deering explains that they passed two motions opposing the proposed project and requesting that a Public Hearing be held in Deering to address the concerns of area residents.
- May 27, 1996 In a letter to DGC, the NANA Regional Corporation, Inc. states that the proposed dredge mining activity is inconsistent with the NWAB Coastal Management Plan (CMP) because the proposed activity is within an Important Resource Use Area (IRUA). The letter explains that the designation is necessary to protect anadromous fish runs, herring migration, and important waterfowl. NANA also requests a public hearing on the proposal to "be held in Deering at a date and time most convenient to Deering residents."
- May 24, 1996 In a letter to DGC, the Buckland IRA Council requests that the application be denied due to impacts on "subsistence and migration of sea mammals of Beluga, Seal, Walrus, fish and Birds, ...which is 80% of our food."
- May 24, 1996 In a letter to Mr. Winkle, DGC requests a copy of his EPA National Pollution Discharge Elimination System permit. The letter also contains comment letters from the City of Buckland and the Deering IRA Council.
- May 28, 1996 In a letter to DGC, the Maaniilaq Association opposes the dredge mining operation due to concerns about the project's impact on marine mammal migration. The letter specifically mentioned the potential for noise impacts on marine mammal migration.
- May 30, 1996 In a letter to COE, the Kotzebue IRA recommends that the COE deny the application. The letter expresses a concern that the applicant had not adequately considered the potential impacts that may result from the project, including adverse impacts to beluga whale, seal, walrus and fish habitat.
- June 3, 1996 In a series of letters from DGC to Buckland, IRA Council, the Buckland City Council, Deering IRA Council, Maaniilaq Association, NANA Regional Corp. Inc., DGC acknowledges receipt of their respective objections to the proposed dredge mining operation. DGC encourages all of the communities, organizations and corporations to coordinate comments with the NAB to be used in the NAB CMP consistency review.

- June 3, 1996 In a Fax, DGC sends Pat Galvin regulations that address project review extensions to obtain additional information and conduct public hearings.
- June 6, 1996 In a DGC letter to Kotzebue IRA, DGC acknowledges receipt of their objections to the proposed dredge mining operation, and encourages Kotzebue IRA to coordinate comments with the NAB to be used in the NAB CMP consistency analysis.
- June 6, 1996 In a letter to the City of Deering, DGC acknowledges receipt of their objections to the proposed dredge mining operation, and encourages the city to coordinate comments with the NAB to be used in the NAB CMP consistency analysis.
- June 17, 1996 In a letter to DGC, the Northwest Arctic Borough (NAB) explained that the NAB has conducted a review of the proposed project application and "found the project inconsistent with the enforceable policies of the NAB CMP." An attachment to letter was a resolution and analysis passed by the NAB finding the project inconsistent with the borough CMP. The consistency analysis referenced Policy A-1 Subsistence Use, C-3 Habitat Maintenance, C-4 Offshore Areas, G-4 Compatibility, Section LL Inmachuk River Important Resource Use Area, and Policy LL-1 Subsistence as applicable to the proposed project. The analysis finds the proposed project inconsistent with all of these policies and plan sections. The letter also referenced letters sent to DGC from 6 Native villages, organizations and corporations opposing the project.
- June 13, 1996 In a letter to DGC, the DNR SHPO stated that the Division had reviewed the referenced projects for conflicts with archaeological and historic cultural resources. The letter states that "it appears the proposed projects will not impact any resources listed on or eligible for inclusion in the National Register of Historic Places." The letter further states that "the proposed project appear to be consistent with both the NW Arctic Borough CRSA and the Bering Straits CRSA Coastal Management Program standards for the protection and management of significant archaeological and historic cultural resources."
- June 15, 1996 In a letter to DNR, the BSCRSA Planning Director stated that the Northwest Arctic Borough had reviewed the application for LAS 20243 and found the project to be inconsistent with the enforceable policies of the Northwest Arctic Borough Coastal Management Plan (NAB CMP). The borough requests in the letter that DNR hold a public hearing in Shungnak if DNR finds the project consistent with the NAB CMP.
- June 18, 1996 In a letter to DGC, the ADF&G stated that the Division had reviewed the proposed project and found the proposed activity consistent with the Standards of the ACMP and the Northwest Arctic Borough Coastal District Program with four stipulations. The stipulations included buffers to protect anadromous fish streams, and minimize turbidity plumes in areas important for fish migration and subsistence activities.
- June 18, 1996 In a letter to the COE, the U.S. Department of the Interior Fish and Wildlife Service, stated that the agency had "general concerns" for all proposed dredging areas including "potential effects on seabird colonies along coastlines and on islands; effects on marine mammals including seals, walrus, and beluga whales, anadromous fish species, and effects on invertebrate fauna." The letter also mentioned a concern about the potential effects on the historic district of Cape Krusenstern National Monument. The letter details potential adverse impacts and

recommends that the proposed activity be prohibited from areas with important habitat for fish and wildlife, and that the proposed activity only be permitted in other areas only in conjunction with a monitoring program adequate to document the magnitude and duration of changes to water quality, benthic communities, and other fish and wildlife resources.

June 28, 1996 In a letter to Mr. Winkle, DGC sets forth a Proposed Consistency Determination explaining that "the State does not concur with your certification that your proposal is consistent with the ACMP." The letter further explains that the NAB finds the project inconsistent with the enforceable policies in the NAB CMP. The letter lists the following applicable NAB CMP enforceable policies and explains the rationale for the project's inconsistency with the policies: A-1 Subsistence Use, C-3 Habitat Maintenance, C-4 Offshore Areas, G-4 Compatibility, LL Inmachuk River Important Use Area -- LL-1 Subsistence, CC Kobuk/Selawik Lakes Important Resource Use Area -- CC-2 Fish, CC-3 Alternative Sites, and Other Use Areas. The letter further asks that Mr. Winkle contact DGC within five days of receiving the letter to indicate whether or not he concurs with the determination, and explains elevation and petition procedures.

July 15, 1995 In a letter to Mr. Winkle, DGC sets forth a Final Consistency Determination explaining that DGC had completed coordinating the State's review of the proposed dredge mining operation for consistency with the Alaska Coastal Management Program (ACMP). The letter explains that "the State does not concur with your certification that your proposal is consistent with the ACMP." The letter further explains that the NAB finds the project inconsistent with the enforceable policies in the NAB CMP. The letter then lists the same applicable policies discussed in the June 28, 1996 Proposed Consistency Determination letter and explains the rationale for the finding of inconsistency or each respective policy. The letter closes by explaining that the COE will be notified of the determination.

July 22, 1996 In a letter to Mr. Winkle, the COE notifies Mr. Winkle that the proposed DA dredge mining permit has been denied because of the DGC finding that the project is inconsistent with the Alaska Coastal Management Program.

Appendix C. Case Chronologies.

WINKLEMAN: Trapping Cabin Case

- 1984 The Alaska Department of Natural Resources (DNR), Alaska Department of Fish and Game (ADF&G), and the Alaska Department of Environmental Conservation (ADEC) prepare and adopt the Bristol Bay Area Plan (BBAP).
- October 30, 1985 Donald A. Winkelman submits an application for a State of Alaska Department of Natural Resources Division of Land and Water Management (DL&WM) Trapping Cabin Construction Permit to construct three trapping cabins on different sites along a trapping line on the King Salmon River and a nearby tributary creek in the Bristol Bay Area Plan (BBAP). The permit is proposed to be valid for ten years. The application is accompanied by a letter from the Alaska Department of Fish and Game (ADF&G) certifying that Don Winkelman had been actively working at commercial trapping in this area for the "past four seasons."
- December 18, 1985 The DL&WM prepares and distributes an Interagency Review Notice (IRN) stating its proposed intentions to issue five trapping cabin construction permits, including a permit for Mr. Winkelman. The notice explains that Mr. Winkelman's application includes a request for more than one cabin site, and that the applicants had been asked to justify his need for additional sites as required by the BBAP. The BBAP distribution list included eight state agencies, and 24 Native government, corporations or organizations.
- December 23, 1985 In response to the agency review notice, the DNR Division of Oil and Gas (DO&G) states that it has no objection to any of the permit applications "since these activities are not expected to negatively impact sub-surface resources and related development."
- December 27, 1985 In response to the agency review notice, the DNR Office of History and Archaeology (OH&A) request an archaeological survey of each of the proposed cabin sites. The letter cites a section of the State Bristol Bay Area Plan as requiring "appropriate protection of historic and cultural resources."
- January 8, 1995 The DL&W Resource Allocation sends a letter recommending that the project reviewer consider notifying village councils instead of village corporations "as the councils may be more representative of the community." The letter also states that there is a need to revise the trapping cabin construction permit application form to clearly state that trapping cabins are subject to provisions of area plans. Finally, in regards to Mr. Winkelman's cabins, the letter states that "it appears that two of Mr. Winkelman's cabins are relatively close to each other, and it may be hard to justify the need for both as he plans to travel by snowmachine."
- January 8, 1996 In a letter to Mr. Winkelman, the DL&WM requests more information from Mr. Winkelman about travel times between the three cabins to justify the need for more than one cabin and respond to the concerns of DNR's Resource Allocation Section. The letter also requests a copy of the current trapping license.
- January 14, 1986 In a letter to DL&WM, Mr. Winkelman explains that "Because of the rough terrain and heavy snowfall plus the short amount of daylight during the

trapping season, I wanted the other two cabins for safety or emergency purposes." Mr. Winkelman further explains that he uses a snowmachine on the trapline, and the distance of trapline between cabins is approximately 20 miles." Mr. Winkelman attached a copy of his trapping license to the letter.

January 17, 1986 In a letter to DL&WM, the ADF&G indicates no objection to issuance of any of the proposed trapping cabin permits, "so long as amendments to the applications by Winkelman and Braswell provide justification to warrant construction of more than one cabin." The letter also states the ADF&G recommends that the projects be found to be consistent with the Alaska Coastal Management Program.

January 17, 1986 In a letter to DL&WM, the Bristol Bay Coastal Resource Service Area (CRSA) Board indicates that the Winkelman permit application be further reviewed prior to making a decision. The letter explains that the Bristol Bay CRSA has received information from an area resident that Mr. Winkelman has not been trapping in the proposed cabin area for the amount of time suggested on the application. The Bristol Bay CRSA suggests a more thorough review of the application to establish regular use in the proposed cabin area. The letter also questions the need for three cabins for a trapline that is only eighty miles in length. The letter explains that this is a relatively short distance to travel when using snowmobiles.

January 23, 1986 In a letter to DL&WM, Mr Winkelman acknowledges receiving his receipt from DL&WM for his filing fees and asks when he may expect to receive a permit. He wonders if the receipt is a symbol of acknowledgment. He requests an immediate reply so that he can begin building the cabins.

January 23, 1986 In a letter to DL&WM, Mr Winkelman acknowledges the telephone conversation with DL&WM on 2/11/86 and states that he is only interested in building one cabin. He states that this is his first year trapping on the upper King Salmon River. He chose the King Salmon River after talking with people that live along the Nushagak River and ADF&G and finding that the area had not been trapped for over six years. He also states that there are no cabins within 25 to 30 miles of his proposed cabin site.

January 23, 1986 In a letter to DL&WM, Mr Winkelman explains that he had a telephone conversation with OH&A and that the office had no objection to the issuance of the permit. He stressed the importance of getting his permit soon so that he can cut trees this Spring.

February 11, 1986 In a telephone conversation, the DL&WM reviewer informs Mr. Winkelman of the letter from the BS CRSA questioning the amount of time that Mr. Winkelman had actually trapped in the cabin area. Mr. Winkelman explained that he had moved to Koliganek within the past year, but had actively trapped in Togiak for several years. DNR DL&WM explained to Mr. Winkelman that the information in the file was probably insufficient to issue a permit for 3 cabins. Mr. Winkelman suggests two sites most important to his trapping activities.

February 12, 1986 In a file note, the DL&WM permit reviewer states that there is "no justification to issue the permit for two cabins." Also, the permit reviewer notes a discussion with DNR OH&A indicating the possibility that the proposed cabin area could be the subject of an archaeological survey scheduled for the area.

- February 13, 1986 In a file note, the DL&WM permit reviewer notes a conversation with 'KK' and states that both agreed that since Mr. Winkelman is a "bonafied trapper," and that DL&WM should issue the permit.
- March 4, 1986 In a Memorandum, the OH&A states no objection to the revised application showing only one trapping cabin site proposed for use in the upper King Salmon River area. The letter requests that a stipulation be included on the permit approval requiring notification of OH&A if any cultural or paleontological resources be discovered.
- March 24, 1986 The DL&WM sends a letter to Mr Winkelman with the attached permit for a trapping cabin. The permit was dated March 19, 1986 with standard conditions and stipulations regarding the cabin's construction and use. The permit was accompanied by several photocopied pages of the State Bristol Bay Plan that set forth State guidelines for permitting trapping cabins in the BBPA, including guidelines for protecting of fish and wildlife habitat during construction and use of the cabin.
- 1987 The Bristol Bay Coastal Management Plan (BBCMP), prepared by the Bristol Bay CRSA, is approved under the ACMP. The plan provides direction for managing land and water uses in coastal areas throughout most of the Bristol Bay region. The plan was updated in 1992 to reflect the reduced district boundary due to incorporation of the Lake and Peninsula Borough.
- 1990 The Nushagak and Mulchatna River Recreation Management Plan (NMRRMP) is adopted by DNR and ADFG as a land use plan, and by the Bristol Bay CRSA as an Area Meriting Special Attention. The plan was developed in response to "public concern about subsistence use and increased recreational use" in the Nushagak and Mulchatna drainages.
- January 10, 1996 Mr. Winkelman submits a letter to the DNR Division of Land (DL) requesting that a trapping cabin permit be reissued for another ten year term. The letter was not available in the DNR File and has apparently been misplace at DNR DL (personal communication with Dave Kelly, 10/3/96).
- January 26, 1996 In a letter to Mr. Winkelman, the DL acknowledges Mr. Winkelman's letter requesting reissuance of his trapping cabin permit. The letter requests a permit fee, a copy of trapping license, and evidence of regular use of the trapping cabin.
- February 20, 1996 In an Interagency Review Notice, DL provides notice of Mr. Winkelman's request for a trapping cabin permit and requests comments on the proposed application. The notice was sent to the BBCRSA, ADF&G, DNR Division of Parks and Outdoor Recreation, Alaska Department of Environmental Conservation (ADEC), Nushagak Fish and Game Advisory Board, and two private conservation organizations: Fish and Wildlife Protection and Wildlife Conservation. The notice contained copies of pages from the DNR Bristol Bay Area Plan specifically stating a Management Guideline for the renewal of Mr. Winkelman's trapping cabin permit. The guideline states that "a trapping cabin construction permit was granted in this unit in 1986...Renewal of the existing trapping cabin permit may be allowed in accordance with AS 38.95.075."
- March 9, 1996 In an Adjudicator Attestation memorandum, the DL documents a phone conversation with ADF&G. ADF&G could not confirm that Mr. Winkelman

had used the trap line and cabin at least during alternating trapping seasons consistent with the trapping cabin program statute and regulations.

March 15, 1996 In a letter to DL, the Bristol Bay CRSA Coastal Management Program (CMP) stated their objections to the reissuance of the trapping cabin permit. The letter recommends that the permit be denied because Mr. Winkelman has not met the requirements of the trapping cabin permit Guideline 12.3 set forth in Unit 12 (King Salmon River Corridor) in the NMRRMP which requires that the applicant prove continuous use of the trapline and cabin at least during alternating trapping seasons. The letter states the following reasons for the Bristol Bay CRSA CMP recommendation for a denial:

1. According to ADF&G Sealing Certificates submitted with the renewal request, the only year the applicant trapped from his cabin in the past four years was during the 1991 season.
2. From 1993 through 1995 (Mr. Winkelman) trapped along the Lower Togiak River, which is a considerable distance (over 200 miles) from his cabin on the King Salmon River.
3. Mr. Winkelman moved to Togiak several years ago and no longer resides in Koliganek. The village of Koliganek is located about forty miles down river from the confluence of Nushagak River and the King Salmon River. Mr. Winkelman lived in Koliganek when he applied for and received a trapping cabin permit.
4. The Nushagak River Villages that use this area for winter subsistence hunting have not witnessed any trapping activity from his cabin the last several years.

The letter further recommends that Mr. Winkelman be given a reasonable period of time to remove his cabin and personal property from the site.

March 18, 1996 In a letter to DL, Robert Heyano acknowledges receipt of the Bristol Bay CRSA CMP letter and states that he agrees with the letter.

March 26, 1996 In a letter to DL, Kathryn Yahr states that she is writing on behalf of Mr. Winkelman and his efforts to obtain a renewal of a trapping cabin. Ms. Yahr states that she has seen Mr. Winkelman at the cabin during the months of September and early October conducting trapping activities.

March 26, 1996 In a letter to DL, Mr. Winkelman states that during the years of 1986-1989 he has spend most of the winters at the King Salmon River cabin. Since 1990 he has made every attempt to spend at least part of the trapping season at the cabin, but due to personal circumstances he has not been able to spend as much time there as he would like. Mr. Winkelman attached receipts for fur trapped in 1993-1995.

June 12, 1996 DNR's Southcentral Regional Office manager meets with Bristol Bay CRSA staff and member of Nushagak Fish and Game Local Advisory Committee to discuss and clarify concerns with the trapping permit program.

June 13, 1996 In a letter to DL, Mr. Winkelman references an attached letter and submits pages from his logbook reflecting activities at his cabin between 1993 and

1995. The attached letter is dated June 12, 1996 and is written to DL. In the letter, Mr. Winkelman provides a detailed explanation of his trapping activities over the last ten years. He explains that he was actively trapping between the years 1986 to 1989. However, he did not use the cabin for all of 1990. Between 1991 and 1995, he used the cabin sporadically during the winter months. Mr. Winkelman states that in the ten years that he's spent building and trapping from the cabin, there has "not been one villager from any village that has been to the cabin during the trapping season." Attached to the letter are photographs of Mr. Winkelman at the cabin along with fur receipts.

June 18, 1996 In a letter to the Bristol Bay CRSA Coastal Management Program, the DL indicated its intentions to **approve** the renewal of Mr. Winkelman's trapping cabin permit. The letter states that this was not an easy decision for DL and is complicated by the statutes and regulations that originally enabled trapping cabin authorizations. The letter states that the original permittees in this area are only required to have been in compliance with the conditions of the original permit. These original permits do not require proof of continued use of the cabins. They only had to prove that they used the cabin once during alternating trapping seasons, which is only once every two years. Mr. Winkelman meets this criterion. The letter continues by explaining that the Winkelman case has prompted DL to make significant changes to their permit program. The changes will require better proof of cabin use, and require that this proof be submitted to DL once a year throughout the course of the ten year authorization.

June 20, 1996 In a letter to Mr. Winkelman, the DL submits two sets of Trapping Cabin Construction Permits to be filled out by Mr. Winkelman and returned to DL. The permits reflect the new language discussed in the January 18th letter from DNR to BB CRSA.

June 28, 1996 In a memo to DNR, the BBCRSA provides additional rationale for suggested changes to several permit conditions that were addressed in the CRSA's June 23 comments. It also recommends including the Activity Report form, drafted by the CRSA, to provide a more complete picture of a permittees trapping activities, as an annual requirement for permits in the Nushagak Mulchatna planning area.

August 29, 1996 Div. of Lands staff and BBCRSA staff discuss the proposed permit changes suggested by the CRSA. The DL agrees to incorporate most of the changes and include the Annual Activity Report as an annual requirement. The BBCRSA agrees to administer the annual report.

September 23, 1996 In a letter to Mr. Winkelman, the DL added permit stipulations that further define when and for what purpose a trapping cabin can be used, and to require better accountability of cabin use. The letter requests that Mr. Winkelman sign revised permits and return them to DL.

Appendix C. Case Chronologies.

GOODNEWS BAY: Offshore Prospecting Case

1982 Karin Sheardown filed 22 Offshore Prospecting Permit applications with the State of Alaska Department of Natural Resources (DNR) Division of Mining (DOM). These applications covered 52,878 acres of submerged land inside Goodnews Bay and outside the Bay, as well as along the Goodnews Bay and Kuskokwim Bay coastline. The permit applications were filed in the hopes of finding platinum.

March/April 1988 The DOM informed DGC that the proposed mining operation was a single agency action, and consequently DOM would coordinate the consistency review and work with the coastal district and agencies.

DOM informed the Cenaliulriit CRSA Coastal District that DOM was beginning to collect information to prepare an assessment, compute a consistency review issue and Best Interest Finding (BIF). In April 1988, DOM held a meeting, attended by representatives for the Alaska Department of Fish and Game (ADF&G), the Alaska Department of Environmental Conservation (ADEC), the Cenaliulriit CRSA Coastal District, Kuitsarak Corporation, Arviq Corporation, DOM, and the Assessment Report contractors.

Because DNR did not have adequate funding to prepare an Assessment Report, Sheardown and DNR entered into a contract wherein Sheardown agreed to fund preparation of this report, using DNR-approved contractors. The contract between DNR and Sheardown outlined the types of information DNR required, including a detailed description of the area, its mineral potential, habitat and wildlife information, the impact on local communities, the possible impacts of exploration, and mining operations, and mitigation measures.

June 1988 DNR and the coastal district arranged public meetings in Goodnews Bay and Platinum to discuss the permit application and DNRs process for evaluating the permit.

October 1988 DNR held a meeting to discuss the Assessment Report contractors' preliminary findings, attended by representatives from DNR, the DEC, and ADF&G.

November 1988 Sheardown submitted a draft Assessment Report to DNR, and DNR released it for public comment, sending it to the District, ADF&G, and DEC. The District objected strenuously to the findings, and ADF&G suggested over one hundred changes.

January 1989 Sheardown submitted a final Assessment Report to DNR, which responded to the issues raised some of the November comments. DNR sent copies to ADF&G, DEC, the DGC, the Cenaliulriit coastal district, and the Association of Village Council Presidents, noting that a draft Best Interest Finding and proposed coastal consistency determination would be prepared after DNR held informal public meetings. DNR also sent a summary of the Assessment Report to several residents of Platinum and Goodnews Bay.

February 1989 DNR conducted informal public meetings on the final Assessment Report in Bethel, Goodnews Bay, and Platinum.

March 9, 1989 Based on the Assessment Report, DNR issued its preliminary Best Interest Findings, and proposed consistency determination, which stated that the project was consistent with the Cenaliulriit CRSA CMP. DNR published notices in three newspapers, sent notice to the postmasters and corporations of Goodnews Bay and Platinum, as well as the 12 village corporations and 48 individuals who had attended the public meetings. DNR also prepared a videotape in Yup'ik and English regarding their proposed action, and provided these to the Cenaliulriit District.

The Cenaliulriit coastal district, ADF&G and 12 communities affected by the proposed project objected to these preliminary findings. The communities expressed concern about subsistence and commercial wildlife uses offshore, and ADF&G suggested that applications be rejected within the Bay and within one-half mile from the coastline. All of the comments expressed concerns about the potential impact of mining on subsistence, and criticized certain data gaps.

July 1990 DNR issued a proposed final Best Interest Finding, and proposed final consistency determination. This version contained several stipulations that attempted to meet objections to the proposed exploration project, as well as redefining the project to reject all applications within the Goodnews Bay, within one-half mile of the sandbar and shoal, and within 500 feet from the Kuskokwim Bay coastline. Additionally, DNR re-wrote two sections of the Assessment Report, in response to complaints that the report reflected the biases of one contractor who had staked claims in some of the subject lands.

July 13, 1990 The Cenaliulriit coastal district wrote a letter to DNR acknowledging receipt of the Final Best Interest Findings (FBIF) and final consistency determination, and the re-written Assessment Report and notifying DNR that the coastal district had decided to "elevate" DNR's decision to the Commissioner level. The elevation letter provided a brief summary of Cenaliulriit's reasons for the elevation, including concerns about the late date that the District received the preliminary Best Interest Finding (PBIF) and Resource Assessment Report (RAR), the adequacy of the proposed coastal buffer zone, the adequacy of the stipulations designed to address prospecting and eventual mining (the District maintained that DNR should address impacts of mining now, because issuance of Offshore Prospecting Permits would give Sheardown rights to begin mining without further impact analysis and stipulations), the lack of consideration of some of the objectives of the state's offshore mining program, and the failure of the state to recognize the total costs associated with the long term impacts and displacement of local communities as a result of the mining operation.

August 10, 1990 In response to the Commissioner's decision, DNR issued its final Best Interest Finding and Coastal Consistency Determination, with 18 stipulations, and a discussion of how these stipulations respond to the standards at issue in the coastal district plan.

August 17, 1990 The coastal district filed a petition to the Alaska Coastal Policy Council (CPC). ACMP statutes require a determination that the appellant's petition make a "showing" that the plan has not been complied with, before the CPC will hold a petition hearing. The CPC, pursuant to "Guidelines for Processing Petitions Received by the Coastal Policy Council under AS 46.40.100," held a subcommittee

hearing attended by DNR, Sheardown and the coastal district. This CPC subcommittee decided that substantial evidence supported DNR's decision, and that the coastal district had failed to make the requisite showing. In making its decision, the CPC subcommittee used a "substantial evidence test" in determining whether the coastal district made a "showing" that DNR did not properly follow procedures or consider coastal district policies. The substantial evidence standard required the coastal district to prove on the face of the record presented that..."there was not enough relevant evidence that a reasonable person would accept to show that it properly followed DNR procedures and also considered pertinent, enforceable district program policies and ACMP standards."

September 17, 1990 The Cenaliulriit coastal district, Kuitsarak Corporation and 4 other area Native corporations and organizations, including the District, filed an appeal of both the Best Interest Finding of DNR and the "showing" decision of the Coastal Policy Council to the Alaska Superior Court. The appeals were consolidated by the Court. The appeal argued that DNR's Best Interest Finding on the OPPs was in violation of (1) DNR's own regulations because the decision was based on an Assessment Report that was prepared by Sheardown under contract with DNR -- a conflict of interest; and (2) the Bristol Bay Area Plan Guidelines which require DNR to not only evaluate the impacts of exploration, but also the impacts of mining. The appeal argued that DNR has a limited ability to prohibit mining once the permittee finds a workable mineral deposit, and, thus, that DNR must determine at the OPP stage whether a particular area can withstand mining impacts, and not just exploration.

February 1991 The Superior Court Judge issued a ruling on the appeal in which he upheld the DNR Best Interest Finding stating that there was no conflict of interest in the DNR contract with Sheardown because DNR provided adequate protections to prevent a conflict of interest, that DNR had provided ample opportunity for local government, public and agency comment on the Best Interest Findings and by including 18 stipulations in the findings report indicating that DNR had taken a hard look at all the issues. The Judge also felt that DNR's Best Interest Findings adequately addressed impacts of both exploration and mining, so there was no need to address Cenaliulriit's concerns that more stipulation were necessary to address future mining impacts.

The Superior Court Judge did agree with the coastal district on one point -- that the CPC had not used the correct legal standard in its showing hearing. The Judge concluded that the CPC misapplied AS 46.40.100 (b), which requires that the coastal district only needed to making a "prima facie" showing, and not a "substantial evidence" showing in determining whether a petition hearing was necessary. The "prima facie" standard is a lower standard that puts less of a burden on the coastal district to prove the need for a formal administrative hearing.

July 1991 A second showing hearing was held by the CPC. This time the "prima facie" legal standard was used and the CPC voted that a showing had been made, and the petition should be heard by the CPC. An Hearing Officer (HO) was appointed.

Sept. 23-24, 1991 The CPC held a petition hearing with an appointed Hearing Officer to consider the District's petition. At the hearing, the coastal district contended that the issuance of OPPs in the Goodnews Bay area was in violation of Cenaliulriit's coastal management program as a whole because there is inadequate information on the impacts of offshore exploration and mining on environmental, biological,

socioeconomic and cultural values, including subsistence habitat and activities. The District specifically requested that (1) OPPs should be rejected in all areas up to 1/2 mile from the coast, not merely deferred for further study; (2) all OPPs should be rejected at the entrance to Goodnews Bay; and (3) DNR should require the completion of substantial additional studies before any OPPs were actually issued. DNR defended their coastal consistency determination by explaining their public and agency review process and explaining their coastal policy analysis and its stipulations.

October 31, 1991 The hearing officer issued a decision. In addressing the District's concerns about the adequacy of the DNR impact analysis, the hearing officer referenced the Superior Court conclusion that there was adequate information for DNR to make best interest finding, and that these conclusions were equally valid for the ACMP consistency determination. The hearing officer also referenced the Superior Court decision that DNR had adequately addressed both exploration and mining impacts and that this conclusion was equally valid for the ACMP consistency determination.

With regard to the coastal district's argument that DNR erred in applying the enforceable policies of the Cenaliulriit CRSA CMP, the hearing officer concluded that the District's enforceable policies are framed in general and flexible terms. The policies recognize the possibility of conflicting uses, and require that an agency apply the concept of "reasonable balance" in the event of conflicting uses. The hearing officer decided that DNR had found a reasonable balance in its consistency determination. For example, the Cenaliulriit CRSA CMP habitat policies allow disturbance of habitats if there is a significant public need or no feasible or prudent alternative. The hearing officer felt that the DNR decision found significant "public need" and that no "prudent alternative" was feasible. The hearing officer singled out language in the Cenaliulriit CRSA CMP suggesting that the coastal plan cannot unreasonably interfere with agency operations, and suggested that DNR had taken every effort to consider the Cenaliulriit coastal plan and worked with the coastal district to the extent that requiring more could be characterized as interference and inconsistent with the Cenaliulriit CRSA CMP.

With regard to the coastal district's concern that DNR did not give due deference to its comments and recommendations on the OPPs, the hearing officer ruled that DNR had given due deference for the following reasons:

- (1) DNR provided the coastal district and other interested parties with ample notice and opportunity to comment at nearly every stage of the consistency review process.
- (2) In response to comments received from the coastal district and other interested parties, DNR significantly limited the geographic area of the OPPs.
- (3) DNR added 18 stipulations to address concerns of the coastal district and other parties. The stipulation impose additional requirements for any future exploration or mining activities..
- (4) In making the ACMP consistency determination, DNR provided an itemized explanation of how the OPPs and attached stipulations responded to each policy raised in the Cenaliulriit CRSA CMP.

In conclusion, the Hearing Officer issued a written decision which was adopted by the CPC concluding that the OPPs issued by DNR, with attached stipulations, were consistent with the enforceable policies of the Cenaliulriit Coastal Management Program and that DNR had given due deference to the comments and recommendations of the coastal district.

March 4, 1994 The decision of the Superior Court was appealed by Kuitsarak Corporation and others (including the coastal district) to the Alaska Supreme Court. On March 4, 1994, the Supreme Court issued a decision reversing the decision of the Superior Court and the Coastal Policy Council remanding the case to DNR to conduct another Resource Assessment Report, "best interest" finding and coastal consistency review.

The principal issues associated with the appeal included (1) Did DNR violate state law in agreeing to issue OPP's on tracts of land which were closed to prospecting after January 1988 by statute? (2) Did DNR incorrectly fail to require that the potential impact of mining be evaluated prior to the issuance of a Best Interest Finding and the issuance of an Offshore Prospecting Permit (OPP)? (3) Did DNR incorrectly permit the OPP applicant to prepare the resource assessment report upon which DNR would rely in reviewing the application.

The Supreme Court ruled that DNR had, by its own regulation, closed certain tracts of land and then incorrectly issued OPPs on these tracts. Additionally, DNR failed to require that the impacts of mining the area be studied and evaluated in making the "best interest" finding. The court agreed with Kuitsarak Corporation that DNR would not be able to prepare a second "best interest" finding to evaluate the impacts of mining after the OPPs were issued. The court ruled that the general discussion of mining in the Resource Assessment Report was not adequate for the purpose of determining whether or not development of resource in this area is or is not in the state's best interest.

The court also ruled that DNR incorrectly allowed Sheardown to control the creation of the RAR. The court felt that writing of the report was not adequately overseen by DNR, especially given the fact that one of the contractors who prepared part of the report had a financial interest of its own in issuance of the OPP.

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